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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912. 1913 1914

No. 8[illegible]38

THE NEW YORK ELECTRIC LINES COMPANY, PLAINTIFF IN ERROR,

vs.

EMPIRE CITY SUBWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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FILED OCTOBER 25, 1912.

(23,404)

(23,404)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

No. 829.

THE NEW YORK ELECTRIC LINES COMPANY, PLAINTIFF IN ERROR,

vs.

EMPIRE CITY SUBWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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1

Supreme Court

NEW YORK COUNTY.

2

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

Statement.

3

This is an application for a peremptory writ of mandamus. The proceeding was begun on July 1st, 1910, by the service upon the defendant of a notice of motion.

There has been no change of parties or attorneys since the commencement of this proceeding.

4 **Notice of Appeal.**

SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus
5 directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

Sirs:

PLEASE TAKE NOTICE that the applicant above named hereby appeals to the Supreme Court, Appellate Division, First Department, from the order made and entered in the above entitled proceeding bearing date the 1st day of November, 1910, and signed by Honorable Henry Bischoff,
6 Justice, which said order was filed in the office of the Clerk of the County of New York on the 2nd day of November, 1910, and this appeal is taken from each and every part of said order.

Dated, November 2, 1910.

Yours, &c.,

J. ASPINWALL HODGE,
Attorney for Appellant,
5 Nassau Street,
Borough of Manhattan,
New York City.

To

BLANDY, MOONEY & SHIPMAN, Esqs.,
Attorneys for Respondent,
37 Wall Street,
Borough of Manhattan,
New York City.

WILLIAM F. SCHNEIDER, Esq.,
Clerk of the County of New York.

Order Appealed From.

At a Special Term of the Supreme Court of the State of New York, Part 1 thereof, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, this 1st day of November, 1910.

Present—Hon. HENRY BISCHOFF, Justice.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

A motion having been made by the applicant in the above entitled proceeding, for a re-settlement of the order denying its motion for a peremptory

10 writ of mandamus entered October 26, 1910, and said motion having been consented to,

NOW, on reading and filing the said consent, on motion of J. Aspinwall Hodge, attorney for the applicant, it is

ORDERED, that the said order be, and the same hereby is, re-settled so as to read as follows:

11 At a Special Term of the Supreme Court of the State of New York, Part I thereof, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, this 26th day of October, 1910.

Present—Hon. HENRY BISCHOFF, Justice.

12 In the Matter of The Applictaion of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

The above named applicant having moved for a peremptory writ of mandamus to be issued out of and under the seal of this court, directed to the above named respondent, the Empire City Subway Company (Limited), to require it to grant the application of the New York Electric Lines Company, dated June 7, 1910, to be accorded space for its

electrical conductors in the conduits of the said Empire City Subway Company, together with the necessary laterals and connections for block and building distribution in accordance with the said application of the New York Electric Lines Company, and further requiring said Empire City Subway Company to forthwith give and provide every facility to said New York Electric Lines Company to place its wires under the streets in proper conduits to be furnished by the said subway company in each part of the territory referred to in said application, and for such other and further relief in the premises as might be just, and the said motion having duly come on to be heard,

NOW, upon reading and filing the notice of motion dated July 1, 1910, the affidavit of Wayne W. Wilson, verified July 1, 1910, copy of the application of the New York Electric Lines Company to be accorded space for its electrical conductors in the conduits of the Empire City Subway Company (Limited), dated June 7, 1910, the affidavits of George L. Weed, verified June 27, 1910, of Jesse Larrabee, verified June 28, 1910, of D. A. Reynolds and of J. Aspinwall Hodge, verified June 30, 1910, of Richard W. Hollman, verified July 1, 1910, and the exhibits and papers annexed to said affidavits and referred to therein, in support of said motion; and the affidavits of John H. Cahill, verified August 2, 1910, of Andrew J. Shipman, verified July 27, 1910, of William Conover and John J. Carty, both verified July 29, 1910, of John M. Ferry and Daniel J. O'Driscoll, both verified August 2, 1910, of A. Lawrence Jensen, verified July 27, 1910, of Richard W. Bainbridge, verified July 18, 1910, of Frank W. Conn, A. L. Goldberg, and Henry Hudson verified August 1, 1910, of E. V. C. Eato verified July 25, 1910, Edward D. Harris verified July

26, 1910, Frank A. Weeks and Louis A. Laurencelle verified July 21, 1910, of William H. Miller and Gilbert C. Briard verified July 26, 1910, William O. Ludlow verified July 27, 1910, and Edmund L. Mooney verified August 2, 1910, and the notice addressed to Messrs. Blandy, Mooney & Shipman, and the exhibits annexed to the said affidavits and referred to therein, in opposition to the said motion; and after hearing Alton B. Parker, Esq., of counsel for the applicant, the New York Electric Lines Company, in support of said motion, and Edmund L. Mooney, Esq., of counsel for the respondent, Empire City Subway Company (Limited), in opposition thereto, and due deliberation having been had thereon, upon filing the opinion of the court, it is

ORDERED, that the said motion for a peremptory writ of mandamus be and the same hereby is in all respects denied as a matter of law and not in the exercise of discretion, with fifty dollars ($50) costs to the respondent.

Enter,

H. B.,
J. S. C.

Consent to Resettlement of Order Appealed From. 19

SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited). 20

An omission through inadvertence having occurred in the recitals of the affidavits in opposition to the motion herein for a writ of mandamus, viz., the omission of the affidavit of Richard W. Bainbridge verified the 18th day of July, 1910, the attorneys for the respective parties hereby stipulate and consent that the order entered herein on the 26th day of October, 1910, be re-settled in accordance with the annexed order, without prejudice to the right of respondent to claim the motion should also be denied in the exercise of discretion if the order be reversed. 21

Dated, October 31, 1910.

J. ASPINWALL HODGE,
Attorney for Applicant.

BLANDY, MOONEY & SHIPMAN,
Attorneys for Respondent.

22 **Notice of Motion.**

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

23

Sirs:

PLEASE TAKE NOTICE that upon the application of the New York Electric Lines Company to be accorded space for its electrical conductors in the conduits of the Empire City Subway Company dated June 7, 1910, a copy of which is annexed to the affidavit of Wayne W. Wilson, verified the 1st day of July, 1910, and upon said affidavit, and the affidavit of George L. Weed, verified the 27th day of June, 1910; of Jesse Lazrabee, verified the 28th day of June, 1910; of D. A. Reynolds and J. Aspinwall Hodge, verified June 30th, 1910; of Richard W. Hollaman, verified July 1st, 1910, and the exhibits and papers annexed to said affidavits and referred to therein, I will move this Court, at Special Term, Part I thereof, to be held in and for the County of New York, at the County Court House, on the 18th day of July, 1910, at 10:30 a. m., or as soon thereafter as counsel can be heard, for a peremptory writ of Mandamus to be issued out of and

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under the seal of this court, directed to the Empire City Subway Company (Limited), requiring it to accord and provide space in its subways in the City of New York, for the purpose of placing therein electrical conductors, together with the necessary laterals and connections for block and building distribution, in accordance with the said application made by the said New York Electric Lines Company, on or about the 7th day of June, 1910, and requiring said Empire City Subway Company (Limited) to forthwith give and provide every facility to the said New York Electric Lines Company to place its wries under the streets and in proper conduits to be furnished by the said Empire City Subway Company (Limited) in each part of the territory referred to in said application, and to grant to the said New York Electric Lines Company such other and further relief in the premises as may be just.

Dated, New York, July 1st, 1910.

J. ASPINWALL HODGE,
Attorney for the Petitioner,
New York Electric Lines Company,
No. 5 Nassau Street,
Borough of Manhattan,
City of New York.

To
EMPIRE CITY SUBWAY COMPANY (Limited.)

28 **Affidavit of Wayne W. Wilson, Read in Support of Motion.**

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

In the Matter

of

The Application of THE NEW
29 YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

City and County of New York, ss.:

Wayne W. Wilson, being duly sworn, says that:

1. The Empire City Subway Company (Limited), (hereinafter called the Empire Company), is a domestic corporation.

30 By virtue of Chapter 499 of the Laws of 1885, Chapter 503 of the Laws of 1886, Chapter 716 of the Laws of 1887, Chapter 550 of the Laws of 1890, and Chapter 231 of the Laws of 1891, and in accordance with the provisions thereof, the said Company on the 15th day of May, 1891, entered into a certain contract with the City of New York through the Board of Electrical Control, which was created by said statutes, whereby the said Company secured the right to control the present system of subways, conduits and ducts for low-tension electrical conductors in the streets of New York City. It is now in possession of said system and maintains and

operates all the low-tension subways, conduits and ducts in the City of New York, and under said statutes and contract it is charged with the obligation and duty of according and providing space in its subways, conduits and ducts and leasing the same to any and all companies having lawful power to operate telegraph or telephone conductors in any street in the City of New York whenever any of such companies shall apply for the same. 31

A copy of said contract is hereto annexed and is marked Exhibit A. One of the originals of said contract (which was executed in triplicate) will be produced on the hearing of this motion. 32

2. This deponent is the Secretary of the New York Electric Lines Company (hereinafter referred to as the Company) and has been the Secretary of the Company since the 16th day of January, 1905, and a director since the 15th day of January, 1900, and a stockholder since about the year 1894.

He is familiar with the history of the Company, both before and after his connection with it, not only from the knowledge obtained while in the discharge of his official duties as officer and director, but also from his examination and familiarity with the papers, documents and records of the Company. During his connection with the Company as director and Secretary, he has devoted his time almost exclusively to it. 33

3. The Company is organized under the laws of this State and has lawful power to operate telegraph and telephone conductors in any street, avenue or highway in the Borough of Manhattan, and in certain other portions of the present City of New York, and is an authorized Company and in-

34 tends to operate and use electrical conductors in certain of said streets, as is set forth in its application, to be accorded space in the conduits of the Empire Company, hereinafter referred to

Annexed hereto is a copy of its certificate of incorporation and a copy of its amended certificate, marked Exhibits B and C respectively.

Also, a copy of its franchise granted by the Board of Aldermen of the City of New York and a copy of the minutes of the board showing the acceptance of the franchise by the Company, marked Exhibits
35 D and E respectively.

A copy of the ordinance of 1878 which, it has been claimed, applies to the rights of the Company and provides for the filing of a map is also annexed together with a copy of the description and endorsement upon the map filed by the company in accordance with said ordinance, marked Exhibits F and G respectively.

The original of said map will be produced on the argument from the County Clerk's office.

The rules of the Department of Water Supply, Gas and Electricity of the City of New York pro-
36 viding for the allotment of space in the subways read as follows:

> "1. a. No wires, cables or other electrical conductors shall be placed in any subways, conduits, or ducts now constructed, or hereafter to be constructed, without the written consent of the Commissioner of Water Supply Gas and Electricity being first obtained. Whenever any duly authorized corporation or person desires, or is required, to place electrical conductors underground, application must be made to the Commissioner of Water Supply,

Gas and Electricity, on forms provided for that purpose, for such accommodation as may be desired; and if the Commissioner acts upon such application favorably, he will issue the necessary authorization, in the event that the unused facilities of existing subways are insufficient to meet legitimate requirements.

"b. All plans and specifications for the method of construction of electrical subways must be submitted to the Commissioner of Water Supply, Gas and Electricity for his approval, and, without such approval, no subways, ducts or conduits shall be constructed for the accommodation of any electrical conductors. 38

NOTE—In the construction of electrical subways sufficient conduits should be laid in all subway systems to allow for the probable future requirements of all tenants.

"2. APPLICATION FOR SPACE—a. All applications for space in any subway must be made in writing to the subway company owning the same, and must give the name of the applicant. 39

The purpose for which the conduit or conduits is desired.

The number, material and dimensions of conductors, proposed to be placed therein.

The arrangement of said conductors, whether singly or in cables, and if in cables, the number of conductors and their disposition in each cable.

The maximum electro-motive force to be used on said conductors.

The nature of the insulating material or materials to be employed, and

Such other specific information as will fully explain the use to be made of the space desired.

b. When applications have been made and space assigned for conduits underground, the written consent of the Commissioner must be obtained before any conductors are placed in the space so assigned."

4. On the 7th day of June, 1910, this deponent called at the office of the Empire City Subway Company (Limited), and delivered to its Treasurer, Ford Huntington, an application for space in the conduits of the Empire Company, a copy of which application is hereto annexed and marked Exhibit H. At that time this deponent produced five thousand ($5,000) dollars in United States currency and offered it to the said Huntington, who stated that he acknowledged the tender but preferred not to take the money and refused to take it. Deponent stated to him that the tender would be kept good and the money would be deposited with the Empire Company as soon as the space was accorded.

The rental charged by the Empire Company to all its customers varies from $800 to $900 per mile of duct, the total length of duct applied for by the company under the present application is 29,350 feet or five and fifty four hundredths miles.

The Company is ready, willing and able to give the bond referred to in said application Exhibit H.

5. The company received no reply to said application, and on the 24th day of June, 1910, Mr.

Hodge, one of the Company's counsel, wrote on behalf of the Company to the Empire Company, and enclosed in his letter copies of the papers referred to in it. A copy of his letter is hereto annexed and marked Exhibit J. 43

6. The Empire Company has neglected and refused to accord the space applied for or any part thereof.

7. It has no valid reason for so neglecting and refusing and has given no reason; but the officers and counsel of said Empire Company have claimed upon previous occasions when this Company was seeking to enforce its rights, and when others, including the Empire Company, were endeavoring to prevent it from exercising its franchises, that it had forfeited its right by non-user, and also that its franchise had been revoked by the City. 44

Although this deponent is advisel by counsel of the Company that no such issue can be raised by the Empire Company upon this application or in any other proceeding, he has been requested to set forth the facts and produce some of the documents which establish the validity and the irrevocability of the Company's charter and franchises, including its right to maintain, operate and lease low tension conductors in the streets of the City of New York and its right to continue to exercise all of its powers under its charter, even if such franchises and powers were disputed by the city or state. 45

8. The Company's powers have never been disputed by the state and its franchises have never

46 been called in question by the city except as hereinafter set forth in this affidavit.

The history of the Company is briefly as follows:

9. In October 1882 the Company was organized and at once actively began business.

The art of placing electric wires underground for electrical purposes was then in its infancy, and was not understood. The electrical insulation of wires, as well as their proper protection from moisture and other elements was in its experimental
47 stage.

The Company at once began the prosecution of its of its business in several different directions.

(a) It secured inventions, prosecuted applications for patents for them in the name of the inventor in the Patent Office, and secured their issuance and the assignment of patent rights to it.

(b) It made prompt application in the spring of 1883 to the authorities of the City of New York for a franchise, and prosecuted the application before the city authorities against considerable op-
48 position. The franchise was finally granted by the Board of Aldermen and accepted by the Company.

(c) The Company thereupon laid out its comprehensive system for conduits in the City of New York and duly filed maps and plans in the County Clerk's office on the 18th of May, 1883, in accordance with the city ordinances.

(d) It began the business of manufacturing and testing (partly under its patents pending and afterward granted) of insulated wires, conduits and other devices and appliances. It carried on this

49

part of its business in establishments which it leased in Greenwich, Gold and Cherry Streets in this city. This part of its business included experiments which, at first, were not wholly successful, but which were brought to such a point as to be entirely practicable in 1885 or 1886.

(e) It has aggressively fought its opponents from 1885 down to this date, and by various proceedings in the courts endeavored to secure for itself the right to lay conduits in the streets under its franchise.

50

(f) It has more recently employed a force of engineers who have planned a comprehensive system of wires to be installed in the conduits of the Empire City Subway Company to supply telephone users, and especially the Great Eastern Telephone Company with wires, and in reliance upon its charter and franchise rights upwards of one hundred thousand contracts have been entered into with residents of New York City who are desirous of securing telephonic facilities, and other contracts have been entered into with independent telephone companies outside the City of New York.

51

(g) It has paid from the time of its incorporation to date, all its city, State and county taxes, including its franchise tax, which has been regularly assessed and collected.

(h) It expended prior to 1900 in its business, largely for patents and for manufacturing, a sum largely in excess of $75,000; but how much in excess of that amount I am unable to state, since many of the books of the Company were destroyed

52 as recited in the 7th paragraph of the affidavit of George L. Weed submitted herewith.

Since 1900 more than Four hundred thousand dollars has been expended, in the Company's business.

In so far as the above eight subdivisions of this paragraph do not recite facts within my personal knowledge the sources of my information are the accompanying affidavits, the public records and statute books, and the books and records of the
53 company.

10. The patents and the assignments of patent rights to the Company are referred to in Mr. Weed's affidavit and in exhibits attached thereto.

Seventeen patents were prosecuted and finally issued by the United States Government, and in at least one case the patent was put in interference and a proceeding was prosecuted by this Company known as the Western Electric Company vs. Shelbourne, before the Patent Office in 1887 and thereafter. Mr. Shelbourne, the defendant in that pro-
54 ceding, was the patentee of the patents owned by the Company and was at that time and until his death in the fall of 1887 the President of the Company.

11. The subdivisions (b), (c) and (d) of paragraph 9 hereof, refer to facts the details of which are given in the exhibits already referred to and in the accompanying affidavits of Messrs. Weed, Warren, Larrabee and White.

12. The legal proceedings which the Company took to enforce its rights referred to in subdivision

(e) began in 1885. On June 13th of that year the act referred to in Exhibit A (the contract between the city and the Empire Company) was passed creating a Board of Subway Commissioners afterward known as the Board of Electrical Control. At once there arose many questions concerning the proper procedure to be taken by the Company in laying its conduits, for which there was at that time a public demand, as is partly evidenced by the passage of said act. 55

13. The Company at once made application to the Board of Subway Commissioners for a permit to open certain streets; but on June 20th, 1886, the Board announced to the Company that the act creating the Board did not give it any jurisdiction over the Company, and therefore the Board could not act upon the Company's application for a permit. 56

14. On the following day the Company applied to the Commissioner of Public Works for a permit, which was, during the summer of 1886, refused by him. Whereupon and on the 7th day of September, a mandamus proceeding was brought by the Company to compel said Commissioner of Public Works to issue said permit. That proceeding is known as People ex rel. New York Electric Lines Company vs. Squire, and was brought in the Court of Common Pleas, and is hereafter referred to as the Common Pleas action. 57

15. Meanwhile the Board of Subway Commissioners granted permission to the Consolidated Telegraph and Electrical Subway Company to open certain streets and thereby interfered with

58 the location of the lines of the New York Electric Lines Company. Thereupon, and on the 27th of September, 1886, an action was begun by the Company in the Superior Court (hereinafter referred to as the Superior Court action) for a judgment enjoining the said Consolidated Company and the said Commissioner from interfering with the Company by opening said streets.

16. Immediately after the beginning of said actions and on the 2nd day of October, 1886, an ap-
59 plication was made to the Hon. Denis O'Brien, the Attorney-General by one Daniel L. Gibbens, petitioning the Attorney-General to dissolve the Company on the ground that it did not organize or commence the transaction of the business within one year of its incorporation, and on the ground of non-user under Sections 1798 and 1808 of the Code of Civil Procedure.

This application and petition was immediately denied by the Attorney-General without opinion.

A similar application was made in 1906 and was denied by Attorney-General Mayer as more fully
60 appears in the affidavit of Mr. Hodge herewith submitted.

17. Judge Allen in the Court of Common Pleas denied the application for a peremptory mandamus on the ground that as the law then stood the Board of Electrical Control and not the Commissioner of Highways was the proper party to issue a permit. His opinion is reported in 1 State Reporter, 637, and this order was affirmed by the General Term after rendering an opinion reported in 14 Daly. From this decision an appeal was taken to the Court of Appeals and the order of the

General Term was affirmed January 17, 1888, and is reported in 107 New York, 593. Thereafter an appeal was taken to the Supreme Court of the United States and the decision was affirmed in an opinion reported in 145 U. S., 175, on May 2, 1892.

18. Meantime in the Superior Court action Judge O'Gorman sustained a demurrer to the complaint on August 9, 1887, and that case was not further prosecuted. Another action similar to the action of People ex rel. New York Electric Lines Company vs. Squire, was begun by the Company 62
against Mr. Squire's successor, Hon. John Newton, Commissioner of Public Works, in the fall of 1887, in the New York Supreme Court, in which a decision adverse to the relator was rendered at Special Term. This action was not further prosecuted, since the more important issues in this action and the Superior Court action was being litigated in both the State and federal courts of last resort and would be determined in the Common Pleas action.

During the period that these questions were being litigated, the Company was engaged in the development of its patents and the manufacture of 63
its cables, insulating material and other apparatus, and was prosecuting the aforesaid interference case in the Patent Office. It also entered into certain agreements granting the use of its patents to others who were contemplating underground electrical operation.

19. In 1892 the New York Legislature passed an act known as Chapter 263, which recognized the existence of this Company by providing that that act should "not affect the rights of any cor-

poration inconsistent herewith respecting which rights any litigation is now pending in the Supreme Court of the United States." The knowledge and intent of the legislature in inserting this provision is fully set forth in the 12th paragraph of Mr. Weed's affidavit submitted herewith.

20. The act of 1892 further provided that no permit should be granted opening streets in the City of New York for underground construction unless "there is an existing demand," and the offi-
65 cers of the Company were advised that before proceeding to lay its conduits and electrical conductors in the streets it must show an existing public demand for the same, and this was the position taken by the city authorities.

21. During the preceding years the Board of Electrical Control, which had been persistently opposing this Company, co-operated with the Consolidated Telegraph & Electrical Subway Company and the latter Company had constructed in the streets of New York under the authority of the said Board, conduits and subways which supplied
66 the public demand as it then existed, and continued to supply it down to the time when the patents for the multiple switchboard expired as is set forth in the affidavit of Mr. Reynolds submitted herewith.

22. Shortly after the expiration of the patents of the multiple switchboard and upon the insistent public demand which then arose, the Company made application to the city authorities for a permit to open the streets and to lay its conduits and wires therein. Acting in accordance with an opinion of the Deputy Corporation Counsel William P. Burr,

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the Commissioner of Water Supply, Gas and Electricity refused to grant a permit to the company on the ground that:

> "The Company has no valid franchise or "rights in the streets of the city, nor has it a "legal corporate existence and for this reason "its application should be denied."

The said opinion further advised the municipal authorities as follows:

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> "Further I am of opinion that to avoid any "further questions as to the existence of the "alleged franchise or consent claimed by the "Company, the city should at once formally "revoke the license or permission granted to "it by the resolution passed April 10, 1883."

The Company at once made application to the Supreme Court for a peremptory writ of mandamus to compel the said Commissioner to grant the said application of the Company which was made December 6th, 1905.

69

That proceeding was litigated to the Court of Appeals and the writ was denied; but not for the reason stated by the said Commissioner and the Corporation Counsel. This fully appears in the opinions rendered by Justice Bischoff at Special Term, by Justice Ingraham in the Appellate Division, and by Justice Chase in the Court of Appeals. The said opinions are reported in 51 Misc., 58, 115 App. Div., 254, and in 188 N. Y.

It was held by Justice Bischoff, as appears in said opinion, that there had been no forfeiture of the corporate life of the company, and that:

70

"The franchise from the City obtained by the relator in the year 1883 was irrevocable by the city because not forfeited by any term of the agreement itself."

Citing People vs. O'Brien, 111 N. Y., 1.

But he further held (as did also the Court of Appeals) that the application for the writ

"must be denied upon the ground that the
71 franchise was modified by the state in the exercise of the police power and that the relator's individual right to open the streets for the laying of electrical conductors in conduits of its own has passed."

Both at special term, in the Appellate Division and in the Court of Appeals in said proceeding, which is entitled People ex rel., New York Electric Lines Co., vs. Ellison and others, it was held that the passage of the so-called "Subway Acts" of 1885, 1887 and 1891 was a valid exercise of the police power of the state and did not interfere with
72 the rights of the Company, except to the extent of compelling it to refrain from building its own subways and forcing it to use the subways of the Empire Company under the provisions of this contract with the city.

It was urged by the said Deputy Corporation Counsel in said proceeding that on May 11th, 1906, the following resolution was adopted by the Board of Estimate and Apportionment:

"Resolved, that any and all rights or privileges for the use of the streets, if any such rights or privileges still exist, acquired by said

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New York Electric Lines Company, under the permission granted said company by the said resolution of the Board of Aldermen, passed April 10, 1883, be and hereby are revoked and terminated, and the resolution of the Board of Aldermen adopted on such date is hereby in all respects repealed and revoked."

And the said Burr contended that the said resolution terminated and determined all the prior existing franchise rights of the Company, although elsewhere on the brief submitted by him he says 74
on behalf of the city:

> "It is well to bear in mind that the present claim of relator is not the right to lay wires in subways, a right which no one disputes if exercised by an application to the discretion of the Commissioner of Water Supply, Gas and Electricity, but it is, on the contrary, an alleged 'right to construct subways or conduits beneath the surface of certain streets in the City of New York and for permits to open certain streets for the purpose of such construction work.'"

75

But no attention was paid to this contention in any of the opinions rendered in said proceeding, except that in both of them it is held that the franchise and its acceptance by the Company constituted an irrevocable contract between the city and the Company.

The said resolution of May 11, 1906, was before the court in that proceeding and constituted part of the record.

After the final decision of the Court of Appeals in that proceeding, a writ of error was taken to the Supreme Court of the United States.

Meantime the Company examined carefully engineering and expert advice as to the practicability and relative cost of building its own conduits and of leasing space in those of the Empire Company and finally determined to abandon its appeal to the Supreme Court and to secure space in the existing subways.

23. The officers of the company were informed that the Subway Company would endeavor by every means to prevent the New York Electric Lines Company from securing any space in any of the conduits of the Empire Company in the streets of the city, because the said company was alleged to be in and under the control of the American Telephone and Telegraph Company (sometimes called the Bell Telephone Monopoly).

This deponent thereupon both before and after the application of June, 1907, presently described, investigated this relationship and found that the New York Telephone Company is a subsidiary company to the American Telephone & Telegraph Company, that it is the largest stockholder and customer of the Empire Company and the two companies are officered as indicated in the double column below.

N. Y. TELEPHONE CO.	EMPIRE COMPANY.
Theodore N. Vail,	Union N. Bethel,
Union N. Bethel,	John H. Cahill,
John H. Cahill,	John H. Cahill,
Ford Huntington,	Ford Huntington,
Howard F. Thurber,	Howard F. Thurber,
Theodore N. Vail,	Theodore N. Vail,
Union N. Bethel,	Union N. Bethel,
John H. Cahill,	John H. Cahill,
Howard F. Thurber,	Howard F. Thurber,
Ford Huntington,	Ford Huntington,
and eight others,	John Lieb, jr.

79

The report of the Empire Company filed with the Public Service Commission for the first district for the year ending 1908, has been examined by this deponent and in it said company reports that

> "The total amount of capital stock out-
> "standing is 43,240 shares, whereof the New
> "York Telephone Company owns 38,025 shares
> "and the Edison Light & Power Installation
> "Company owns 5,185 shares."

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Said report further shows that out of a total income account from subway rentals of $1,149,388 it receives from the New York Telephone Company $832,425 and from the New York Edison Company $222,179 and from all other users, $94,783.

In the year 1907 the relationship between said Telephone Company and said Subway Company was substantially the same as set forth in said report of 1908.

Notwithstanding the facts above set forth and ascertained by this deponent the New York Electric Lines Company, on the 17th day of June, 1907, applied to the Empire Company for space in its 81
conduits in certain downtown streets in the Borough of Manhattan, a copy of that application is hereto annexed and marked Exhibit K. The subsequent correspondence is shown in the annexed exhibits L, M and N which are copies of letters sent and received by the parties who signed them and by those to whom they were addressed on or about the days on which they are dated.

24. During the entire period from 1892 to date, the Company has been actively employed in carrying on its business.

82 Its offices during this period have been at 11 Gold Street to 1903, and thereafter at 170 Broadway for several years, and at 32 Broadway, and more recently at 30 Church Street. It has maintained an executive and office force and a corps of engineers and draftsmen, who have been constantly engaged in devising a comprehensive system of wires to supply telephone users in the City of New York with needed wires. It has entered into contracts with telephone users, including the Great Eastern Telephone Company and telephone com-
83 panies operating outside of the City of New York. The space applied for in Exhibit H is an essential part of the said comprehensive plan and is imperatively needed at once.

Over one hundred thousand contracts have been shown to this deponent signed by residents of the city who desire to have telephonic communication with one another and with the world outside of the city by means of the wires to be provided by the New York Electric Lines Company.

The present demand of telephone users for these facilities is further set forth in the affidavit of
84 Mr. Reynolds submitted herewith.

There will be produced on the argument certain maps too bulky to be reproduced or attached hereto, but which may be referred to as Exhibit O and which show the comprehensive plan for telephone connections in the City of New York upon which a vast amount of labor has been expended and upon which the lines asked for in the present application appear.

25. The taxes—city, state and county—were all duly paid during the first years of the Company's existence, as is shown by the affidavits of Messrs.

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Weed and Warren submitted herewith, and this deponent knows of his own knowledge that since January, 1900, when he became director, all taxes assessed or levied against the Company have been paid.

He holds notices and receipts showing the assessed taxation of the franchises of the company, one of them being dated March 5th, 1902, from the Department of Taxes and Assessments of the City of New York notifying the company of an increase of $9,000 in the assessed value of the special franchise of the Company.

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At the time when the validity of what is known as the Ford Franchise Act, providing for special franchise tax, was in dispute, this company with many others failed to pay the tax, awaiting a final decision from the Court of Appeals, and on that occasion the franchise was advertised for sale by the Comptroller of the City of New York. This tax was afterwards paid.

The notices and receipts held by me and on file with the Company show that the Company's special franchise tax has been each year valued by the State authorities and had been duly paid by the Company and collected and accepted by the State authorities, and this has been done both before and after the passage of the resolution of the Board of Estimate and Apportionment of May 11, 1906, hereinbefore referred to.

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26. The amount of money that has been expended in the organization of the Company in its various activities prior to 1900 this deponent has estimated in subdivision (h) of paragraph 9 of this affidavit, at upwards of $75,000.

His information, as to all expenditures prior to

1900 is derived largely from conversations with Messrs. Weed, Warren, Larrabee and White, whose affidavits are submitted herewith, and other directors and stockholders.

Since that year this deponent has been an officer of the Company and his knowledge is personal.

There has been expended in and about the Company's business, including rental of executive and engineering offices, employment of executive and engineer force, securing of contracts for those desiring telephonic communication within and from
89 the city, legal services, payment of taxes and assessments and minor miscellaneous expenses from 1900 to date, a sum in excess of four hundred thousand dollars, which with the amount expended prior to that date, aggregates upwards of four hundred and seventy-five thousand dollars.

A portion of said sum has been expended directly by the Company and a portion by its stockholders and those in contractual relation with the Company or its stockholders, for the benefit of the Company and the prosecution of its business. All of it has been expended in reliance upon the charter and
90 franchise rights of the Company and the decisions of the courts declaring them to be irrevocable.

27. The Company has not transferred any of its franchises to any other company or individual.

(Sgd.) WAYNE W. WILSON.

Sworn to before me this
1st day of July, 1910.

CHARLES F. NOVOTNY,
Notary Public,
N. Y. Co.

Exhibit "A", Annexed to the Affidavit of W. W. Wilson, Read in Support of Motion.

CONTRACT OF MAY 15TH, 1891, BETWEEN THE CITY OF NEW YORK BY THE BOARD OF ELECTRICAL CONTROL AND THE EMPIRE CITY SUBWAY COMPANY.

THIS AGREEMENT made this 15th day of May, 1891, by and between Hugh J. Grant, Mayor of the City of New York, Jacob Hess and Theodore Moss, as and constituting the Board of Electrical Control, in and for the City and County of New York, created under and by virtue of an Act of the Legislature of the State of New York, being Chapter 716 of the Laws of 1887, passed June 25th, 1887, and the Acts of which said Act is amendatory, parties of the first part, and the Empire City Subway Company (Limited), a corporation duly organized and existing under and by virtue of the Laws of the State of New York, party of the second part.

WHEREAS, the said parties of the first part are authorized by said acts, as aforesaid, to cause to be devised a plan for placing underground of all electrical conductors in the City of New York, and to carry the same into operation and effect; and

WHEREAS, by an instrument dated the seventh day of April, 1887, Jacob Hess, Theodore Moss and Daniel L. Gibbens, as Commissioners of Electrical Subways, under and by virtue of an act of the Legislature of the State of New York, being Chapter 499 of the Laws of 1885, passed June 13, 1885, as amended by Chapter 503 of the Laws of 1886, passed May 29, 1886, entered into a contract with the Consolidatel Telegraph and Electrical Subway

Company of the building of subways for electrical conductors in the City of New York, which contract was amendatory of a prior contract between said company and the said Commissioners, dated July 22, 1886, and both of which contracts were subsequently ratified by an Act of the Legislature of the State of New York, entitled "An Act in relation to electrical conductors in the City of New York," passed June 25th, 1887, and certain subways have been built by the said Consolidated Telegraph and Electrical Subway Company under said contracts;

AND, WHEREAS, the said Consolidated Telegraph and Electrical Subway Company, by a certain instrument bearing date the eighth day of December, 1890, conveys to the Empire City Subway Company (Limited) with the consent and authority of the parties of the first part, and the approval of the Mayor and counsel to the corporation of the City of New York, all the subways, conduits and ducts for telephone and telegraph conductors which it has constructed in said city, and also the subways, conduits and ducts for electric light and power conductors constructed by it for the use of the Edison Electric Illuminating Company of New York, and the said Consolidated Telegraph and Electrical Subway Company has applied to the parties of the first part for such a modification of its said contract as shall relieve it from the obligations to maintain, manage and operate the subways, conduits and ducts so conveyed, and from any further obligations to build subways, conduits and ducts for telegraph or telephone conductors, or for the low-tension conductors of the Edison Electric Illuminating Company of New York, and the parties of the first part, by an instrument of even date

herewith, and with the approval of the Mayor and counsel to the Corporation of the City of New York, have so modified said contract, and the Empire City Subway Company (Limited), party of the second part, to whom said subways, conduits and ducts have been conveyed as aforesaid, desires to enter into a contract with the parties of the first part for the maintenance, leasing and management of said subways, conduits and ducts, and the building of further subways, conduits and ducts for telephone and telegraph conductors, and also further subways, conduits and ducts for low-tension 98
electric light and power conductors of the Edison Electric Illuminating Company of New York, and for the owning, leasing, maintenance and management of such subways, conduits and ducts;

AND, WHEREAS, the making of this contract is deemed reasonable, advisable and proper for the purpose of carrying into effect the provisions and intent of said last mentioned act:

NOW, THEREFORE, THIS AGREEMENT WITNESSETH: 99

That in consideration of the premises and of the mutual promises and agreements herein contained, and the sum of One dollar by each of the parties hereto to the other in hand paid, the receipt whereof is hereby acknowledged, the parties hereto agree as follows:

I. The party of the second part hereby agrees to provide, build, equip, maintain and operate, as herein provided, subways, conduits and ducts for telegraph and telephone conductors and for low-ten-

sion electric light and power conductors of the Edison Electric Illuminating Company of New York, its successors and assigns, in the following streets and avenues of the City of New York:

Franklin St., West Broadway to Centre St., Elm St., Franklin to Worth St., 32nd St., Fifth to Madison Ave., 23rd St., Second to Madison Avenue, 58th St., Tenth Ave. to North River, Lexington Ave., 79th St. to 129th St., 79th St., Madison to Fifth Ave., 124th St., Lexington to St. Nicholas Ave., Lexington Ave., 124th St. to north side 125th St., Cortlandt St., Broadway to 18 Cortlandt St., and also such further subways, conduits and ducts for telegraph and telephone conductors and for low-tension electric light and power conductors of the Edison Electric Illuminating Company of New York, its successors and assigns, as the Board from time to time may order.

II. Such subways, conduits and ducts as the Empire City Subway Company (Limited) shall be ordered or directed to build, shall be built in accordance with the plans and specifications therefor furnished or to be furnished by the parties of the first part, or their successors, and the same shall be provided, built, equipped, maintained, operated and kept in good repair by and at the cost of the party of the second part, who will, upon the reasonable demand of the parties of the first part, or their successors, adopt any and all necessary improvements that will increase the usefulness and efficiency of the system contemplated by this contract and the Acts above referred to. The parties of the first part and their successors shall have the right at any time to make such modifications and changes as may be reasonably necessary

in said subways, conduits and ducts, or any of them, or the construction, plans, material, or any other matter connected with them, or any of them, or with the construction, maintenance or operation of them, or any of them, and the party of the second part shall conform to and carry out any reasonable changes or modifications so made. The said subways, conduits and ducts in the streets and avenues above specified shall be completed on or before the first day of July, 1891, and such further subways, conduits and ducts as the said Board of Electrical Control shall from time to time order, shall be built within such reasonable time as said Board shall prescribe.

III. The party of the second part shall, at its own cost, furnish to the parties of the first part and their successors any and all maps, working or other plans, profiles, surveys and drawings, made to scale or otherwise, and all accessible data, figures and information that may be requested by said parties of the first part, or their successors, and necessary, or deemed so to be, for any purpose relating to or connected with said subways, conduits and ducts, or the duties of the said parties of the first part, or their successors, in connection therewith, or relation thereto, and shall also reimburse the parties of the first part, or their successors, for all reasonable expenses incurred by them in superintending and inspecting the construction of said subways, conduits and ducts.

IV. The spaces in said subways, conduits and ducts shall be leased by the party of the second part to any company or corporation having lawful power to operate telegraph or telephone conductors

106 in any street, avenue or highways in the City of New York, or to the Edison Electric Illuminating Company of New York, its successors or assigns, if it or they shall apply for the same.

No space not actually needed for occupation by its electrical conductors in the due course of its business shall be leased to any company or corporation to the exclusion or detriment of any other company or corporation needing space in said subways, conduits and ducts, and desiring and able to pay for the same.

107 The said party of the second part shall, without charge, supply to the City of New York all space in said subways, conduits and ducts necessary for its electrical conductors and the electrical conductors of each separate department of said City which may now or hereafter be required.

If at any time the space in such subways, conduits or ducts shall not be sufficient for all companies or corporations so applying for the same, or for the City of New York, or any of its departments, the additional space needed shall be provided by the party of the second part at its own cost, by the construction, maintenance, equipment and operation of additional subways, conduits and ducts, sufficient therefor, subject, however, to the same conditions and the same control by the parties of the first part, or their successors, as the original subways, conduits and ducts are by the terms of this contract and by any law.

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This contract to be without prejudice to the right of the parties of the first part to enter into such other, further or different contracts as shall be necessary to carry out the intent and purpose of Chapter 716, Laws of 1887.

V. The party of the second part may fix a fair scale of rents to be charged according to the kind of conductors and the amount of space required therefor, which shall be at the same rate to all the occupants having a like use of said subways, conduits and ducts, but the scale of rentals or any charges fixed or made by the party of the second part shall at all times be subject to the control, modification and revision of the parties of the first part, or their successors; and no contract shall be made between the party of the second part and any company or corporation on any terms which shall not require payment by such other company or corporation of rents at the rate so fixed, or as modified by said Board.

VI. Whenever the net annual profits of the party of the second part remaining after the payment of the reasonable and necessary expenses of maintaining and operating such subways, conduits and ducts shall exceed ten per cent. upon the actual cash capital invested by it in providing, constructing and equipping such subways, conduits and ducts, then the excess of such profit over ten per cent. shall be paid into the treasury of the City of New York; but, if in any year or years prior to the earnings of such excess the earnings of the party of the second part shall not have equalled ten per cent., then the party of the second part shall be first entitled to recoup itself out of such excess for the difference between the actual annual earnings and the said ten per cent., the intention hereof being that the party of the second part shall have the right to earn and receive such ten per cent. for each and every year, and that no payments shall be made to the City of New York out of such ex-

cess of earnings until the party of the second part shall first have actually earned and received ten per cent. for each year theretofore. And the party of the second part shall and will at all times keep just, full and true books of accounts, which shall show in detail the transactions had by it, and with whom the same were had, the nature thereof, and especially:

1. The amount of space in said subways, conduits and ducts occupied, with the names of the occupants thereof, and the respective amounts of
113 such space occupied by each occupant.

2. the number and kind of electrical conductors therein, with the names of the owners or users thereof.

3. The gross and net amount in detail of rentals and charges and moneys of all kinds collected or received by the party of the second part, and from whom and for what the same were received or collected, specifying the names of those paying such moneys, and the cause or consideration of such pay-
114 ment in detail.

4. All payments of every kind made by the party of the second part, specifying in detail and separately each payment, and to whom the same was made, and the cause or consideration thereof, so as to show specifically the nature thereof, so that it may be determined whether the same is chargeable to the cost of construction or of maintenance.

And said books and accounts, and all the books, accounts, papers and writings of the party of the

second part shall at all times be open to the inspection of the parties of the first part, or their successors, and of the Comptroller of said City, or any person or persons by him or them deputed to examine the same, and they or he may copy the whole or any part thereof.

And the said party of the second part shall and will, on the first day of October, of each year, make and return a statement to the Comptroller of the City of New York, in such form and verified as he may require and prescribe for the year ending the next preceding first day of September, and any moneys payable to the City under this clause of this agreement by the party of the second part shall be paid annually on the first day of November.

VII. The party of the second part shall not open any street surface without first obtaining a permit therefor from the Commissioner of Public Works or other officers or department of said City vested by law with the control of the surface of the street to be opened, and giving to him or it such an agreement as he or it may approve and require for the proper restoration of the pavement of said street and the surface thereof, and for keeping the same in repair for one year after the same has been so replaced or restored.

VIII. The party of the second part shall not be deemed to be the servant or agent of the parties of the first part or their successors, or of the Mayor and Commonalty of the City of New York, in doing any act under or in execution or performance of this contract, but shall be deemed to be and is hereby intended to be made and dealt with by the

118 *Exhibit "A," Annexed to Affidavit of W. W. Wilson.*

parties of the first part and their successors, and all persons whomsoever as an indepent party contracting with the parties of the first part and their successors and others, and having and acquiring such rights for itself as this contract secures to it.

IX. All companies occupying space in said subways, conduits and ducts, shall own their own conductors and shall have the full management and control thereof except where otherwise mutually agreed upon between the said party of the second
119 part and said companies, subject to the approval of the parties of the first part, or their successors; but said management and control shall be subject to the rights of all other occupants of said subways and to such reasonable rules and regulations as may be made by the said party of the second part with the approval of the parties of the first part or their successors. All maintenance and repairs of such conductors shall be done by the company owning them, under the supervision of the party of the second part, who shall prevent injury to the conductors of other occupants.

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X. The party of the second part shall give a bond to the parties of the first part and their successors in the penal sum of Two hundred and fifty thousand dollars with good and sufficient surety, satisfactory to the parties of the first part, or their successors, securing the just and full performance of this contract, and the building or providing of said subways, conduits and ducts as herein provided and securing said parties of the first part and their successors, and the Mayor, Aldermen and Commonalty of said City well and safely against any

and all patent and other suits arising from the building and operation, use and maintenance of said subways, conduits and ducts, or of any subways, conduits and ducts, provided by the party of the second part, whether the same now are or shall hereafter be built by it, and in the case of insolvency or death of either of the sureties upon such bond the party of the second part will, upon the request of the parties of the first part or their successors, give a new bond of the same tenor and effect and subject to approval the same as the bond so originally to be given. The said bond shall also 122 contain a guarantee to the City of New York, for any and all damages to said City by reason of the construction of said subways, conduits and ducts.

XI. If at any time, in the opinion of the parties of the first part or their successors, there shall be a substantial failure by the party of the second part to fully carry out the provisions of this agreement, and it is so adjudged by competent judicial authority, the Mayor, Aldermen and Commonalty of the City of New York, may enter into possession of such subways, conduits and ducts and the party 123 of the second part shall, subject to any valid mortgage or liens then thereon outstanding, not exceeding fifty per cent. on the actual cost of such subways, and all leases or contracts then existing for the use thereof, as hereinbefore provided, forfeit its interest in such subways, conduits and ducts, and will quietly and peaceably surrender the possession thereof to the Mayor, Aldermen and Commonalty of the City of New York, who shall thereupon and thereafter hold and own the same, subject, however, to the same powers and duties of the parties of the first part or their successors, as the same

would otherwise have been held subject to by the party of the second part, and the same, until otherwise provided by law, shall be maintained and operated by the said Mayor, Aldermen and Commonalty of the City of New York, by and through the parties of the first part or their successors, subject to such lawful liens, mortgages, leases and contracts.

XII. The parties of the first part hereby grant to the parties of the second part the right to build such subways, conduits and ducts as the parties of the first part shall order the party of the second part to build for telegraph and telephone companies, or for low-tension electric light and power conductors of the Edison Electric Illuminating Company of New York, in accordance with such plans and specifications as shall at any time be furnished by the parties of the first part as hereinbefore provided, and said parties of the first part hereby agree to use all lawful means within their power to compel all authorized persons or companies using telegraph or telephone conductors, and also the Edison Electric Illuminating Company of New York, to comply with the provisions of law and to place their conductors in said subways, conduits and ducts and to pay a fair rental for the space occupied therein, but neither the parties of the first part, nor their successors, nor the Mayor, Aldermen and Commonalty of the City of New York, shall be liable or responsible for any neglect or failure on the part of any such company or person so to place their conductors in said subways, to pay the fair rental for the space occupied by him or it; nor shall the Mayor, Aldermen or Commonalty of the City of New York be liable for any neglect, failure

or refusal in the premises of the parties of the first part or their successors.

XIII. The successors of the parties of the first part shall be construed to include those who may succeed them as Commissioners under the provisions of the existing laws or under the provision of any law hereafter passed by the Legislature of the State of New York, or any officer or officers of the City of New York, who shall succeed to the powers and duties of the parties of the first part, or any part of such powers and duties under the provisions 128
of any law now existing or hereafter enacted by the Legislature or any other person, or officers hereafter appointed or selected pursuant to any law to succeed to the powers and duties or any part thereof of said parties of the first part.

XIV. The said party of the second part shall, at any time after January 1 (1897), eighteen hundred and ninety-seven, upon the demand of the Commissioners of the Sinking Fund of the City of New York, by proper instrument or instruments of conveyance or transfer, in due form and duly executed, 129
sell, assign, transfer, convey and set over to the Mayor, Aldermen and Commonalty of said City, the subways, conduits and ducts constructed by it, as aforesaid, and all or any of the contracts or other property of any kind held or owned by the party of the second part, for any of the purposes of its incorporation, when the said Commissioners of the Sinking Fund shall request them so to do, and upon payment of the actual cost thereof; and if the said company shall not have earned ten per cent. per annum on actual cost during the term of this contract a further payment shall be made in

addition to the cost not exceeding ten per cent. on such cost to the extent of such deficiency in annual earnings, or such less sum as may be agreed upon, for which payment the Commissioners of the Sinking Fund shall provide, as provided by law; such transfers, however, to be subject to any valid liens thereon outstanding not exceeding fifty per cent. on the actual cost of such subways and subject to all leases or contracts for the use of such subways then existing.

131 XV. This agreement shall not bind either of the parties thereto unless and until the bond hereinbefore mentioned and required to be given by the party of the second part shall be given within ten days hereafter, or within such further time not to exceed twenty days additional as may be granted for that purpose within said ten days by said parties of the first part or their successors.

Nothing in this contract shall be construed as granting to the party of the second part any exclusive privileges, immunity or franchise whatsoever.

132 XVI. The subways, conduits and ducts conveyed to the party of the second part by the Consolidated Telegraph and Electrical Subway Company, as hereinbefore recited, shall be owned and operated by the party of the second part under and subject to the provisions of this contract and the rights and obligations of the parties of the first part, the party of the second part and the City of New York with reference thereto, shall be the same as if said subways, conduits and ducts had been constructed by the party of the second part under and by virtue of this contract. If at any time

it shall become necessary for any purpose under this contract or otherwise, to consider the cost of said subways, conduits and ducts or the income from rentals of space therein prior to the date of this contract of the cost of operating and maintaining the same prior to said date, the cost of said subways, conduits and ducts to the said Consolidated Telegraph and Electrical Subway Company shall be taken as the cost thereof and the income from rentals of space therein received by the said Consolidated Telegraph and Electrical Subway Company, prior to said date and 134
their proportionate share of the expenses of the said Consolidated Telegraph and Electrical Subway Company in operating and maintaining its subways in the City of New York, prior to said date, shall be taken as the income from said subways, conduits and ducts and the cost of operating and maintaining the same respectively, within the meaning of this contract, just as though said subways, conduits and ducts had been built by, said income received by, and said expenses incurred by the party of the second part under this contract. But no default or act of the said Consolidated Tele- 135
graph and Electrical Subway Company shall in any wise prejudice or affect the party of the second part's right in or title to said subways, conduits or ducts.

XVII. As the Consolidated Telegraph and Electrical Subway Company by its contract with said Board of Electrical Control in and for the City of New York, as modified by said instrument of even date, herewith, remains under the obligation to build such subways, conduits and ducts as may be ordered for electric light and power conductors

except such as shall be constructed for the use of the low-tension conductors of the Edison Electric Illuminating Company of New York, its successors and assigns, nothing in this agreement shall impose upon the party of the second part the obligation to build or maintain such subways, conduits and ducts and the obligations and rights of the said Consolidated Telegraph and Electrical Subway Company with reference to the building, maintaining and leasing of such subways, conduits and ducts shall continue as before said modification of its said contract.

XVIII. It is hereby declared and agreed that the word "conductors" wherever used in this instrument shall be taken to mean feeders, wires and all other appliances used for transmitting electricity under ground.

XIX. This contract shall be executed in triplicate, one copy thereof to be kept and retained by each of the parties hereto, and the third copy thereof to be deposited and filed in the office of the Comptroller of the City of New York and to be a public record.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals, and the party of the second part has caused its corporate seal to be hereunto affixed, and these presents to be signed by its President and attested

by its Secretary the day and year first above written.

HUGH J. GRANT, Mayor,
Commissioner.
JACOB HESS, Commissioner,
THEO. MOSS, Commissioner.
EMPIRE CITY SUBWAY COMPANY
(Limited),

By DAVID B. PARKER,
President.

(Seal of the Company)

Attest:
U. N. BETHELL,
Secretary.

We hereby approve of the foregoing instrument and the execution thereof by the Board of Electrical Control in and for the City of New Yor.

Dated, New York, May 15th, 1891.

HUGH J. GRANT, Mayor
WILLIAM H. CLARK,
Counsel to the Corporation.

Exhibit B, Annexed to the Affidavit of W. W. Wilson, Read in Support of Motion.

CERTIFICATE OF INCORPORATION OF THE NEW YORK ELECTRIC LINES CO.

This is to certify that the undersigned have associated for the purpose of owning, constructing,

142 using, maintaining and leasing lines of telegraph wires or other electric conductors for telegraphic and telephonic communication and for electric illumination, to be placed under the pavements of the streets, avenues and public highways of the Cities of New York and Brooklyn, in the State of New York and under the sidewalks of the streets and avenues of the said cities and upon, over or under private lands in the said cities, within blocks of buildings erected or to be erected therein and for the purpose of owning franchises for laying and
143 operating the said lines of electric conductors, and the purchasing, owning and disposing of such real estate within the said Cities, and such personal property as may from time to time be necessary and convenient to the building, using, maintaining and leasing the said lines of electric conductors upon the terms and conditions and subject to the liabilities prescribed in the act of the legislature of the State of New York passed April 12th, 1848 entitled "An Act to provide for the incorporation and regulation of telegraph companies" being Chapter 265 of the laws of 1848 and the several acts amendatory
144 thereof and supplementary thereto, and in pursuance of the objects declared, under authority of the Act aforesaid, the undersigned hereby certify as follows:

FIRST.—The name assumed to distinguish such association, and to be used in the transaction of its business and by which it may sue and be sued, is the "New York Electric Lines Company."

SECOND.—The general route of the said lines of electric conductors is, for the City of Brooklyn,

commencing at or near the Fulton Ferry in said City and extending North and Eastward through the several streets and avenues thereof to Newton Creek and the boundary line between the Counties of Kings and Queens, and from the said commencing point to the several points in the boundary lines of said City Eastward, Southward and Westward to Bay Ridge and New York Harbor and within the general limits described to connect by any and all streets and avenues, the several points with each other, and with stations, central offices and depots, within the said city, and the said stations, offices and depots with public buildings, residences and offices in the said city or with points of electric illumination or telegraphic or telephonic signal the streets thereof. 145 146

Within the City and County of New York the general routes of the said lines is, starting at or near the Battery to connect by the several streets leading North to Northeastward with offices and depots at central points within the said city and from these offices and depots to connect by any and all the streets, avenues and roads with points in the Northerly and Easterly boundary lines of the said City and County of New York generally, to wit:—by Riverdale Avenue and adjacent streets with Mount St. Vincent, and by Broadway, Macomb's Dam Road, Central Avenue and adjacent channels of communication with the boundary line of the Town or City of Yonkers and Woodlawn Heights, and through the various streets, avenues and roads of Harlem, Morrisania and Tremont with points on the Bronx River and the boundary of the County of Westchester, and further to connect the several offices, depots and points within the outlying limits defined, with each other and 147

with public buildings and offices and with private offices and residences within the said City and County of New York and with points of electric illumination and telegraphic or telephonic signal above the streets and public highways thereof.

THIRD.—The capital stock of such association is Five million dollars, and the number of shares into which the said capital stock shall be divided is fifty thousand shares of the par value of One hundred dollars each.

149

FOURTH.—The names and places of residence of the shareholders and the number of shares held by each of them respectively is as follows, to wit:

Sidney F. Shelbourne of New York City, N. Y., 48,700 shares.

George L. Weed, of the City of Brooklyn, N. Y., 1,000 shares.

Herbert P. Brush, of the City of Brooklyn, N. Y., 100 shares.

William Forse Scott of New York City, N. Y., 100 shares.

150 Edward Barr of the City of Brooklyn, N. Y., 100 shares.

FIFTH.—The said association shall commence at and from the time of the filing of this certificate in the office of the Clerk of the City and County of New York, and of the filing of a copy of the same in the office of the Secretary of State of the State of New York, and the termination of its existence shall be at the expiration of a period of one hundred years from its commencement.

SIXTH.—The capital stock of the association may be increased by a vote of the members owning and holding two-thirds of the stock thereof, or at any time after it shall have actually commenced the laying of wires underground, by a three-fourths vote of its Board of Directors, duly chosen, to Ten million dollars, and the number of shares thereof to one hundred thousand.

SEVENTH.—The principal office of the said association shall be established in the City and County of New York. 152

IN WITNESS WHEREOF we have hereunto respectively set our hands and seals and specified our respective residences.

SIDNEY F. SHELBOURNE, New York. (Seal)
GEO. L. WEED, Brooklyn N. Y. (Seal)
H. P BRUSH, Brooklyn, N. Y. (Seal)
WM. FORSE SCOTT, New York, N. Y. (Seal)
EDWARD BARR, Brooklyn, N. Y. (Seal)

City and County of New York, ss.: 153

Personally appeared before me this 14th day of October, 1882, Sidney F. Shelbourne, George L. Weed, Herbert P. Brush, William Force Scott and Edward Barr, to me personally known and known to me to be the persons described in and who executed the within instrument, and severally acknowledged to me, each for himself, that they executed the same for the purposes therein expressed.

JOHN THEALL,
Notary Public,
New York.

(Seal)

154 *Exhibit "B," Annexed to Affidavit of W. W. Wilson.*

State of New York,
City and County of New York, } ss.:

I, William A. Butler, Clerk of the said City and County, and Clerk of the Supreme Court of said State for said County, do certify that I have compared the preceding with the original Certificate of Incorporation of the New York Electric Lines Company on file in my office, and that the same is a correct copy therefrom, and of the whole of such original.

155

Endorsed, filed and recorded Oct. 14, 1882.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 14th day of October, 1882.

WM. A. BUTLER, Clerk.

(Seal)

(Endorsed)

Certificate of the Incorporation.
of the
156 "New York Electric Lines Company."

State of New York,
Office of the Secretary of State.
Filed and recorded Oct. 18, 1882.

ANSON S. WOOD, Deputy Secretary of State.

City and County of New York, ss.:

Personally appeared before me this 14th day of October, 1882, Sidney F. Shelbourne, George L.

Weed, Herbert F. Brush, William Force Scott and Edward Barr, to me personally known and known to me to be the persons described in and who executed the within instrument, and severally acknowledged to me, each for himself, that they executed the same and for the purposes therein expressed.

JOHN THEALL,
Notary Public,
New York.

(Seal)

158

Exhibit C, Annexed to the affidavit of W. W. Wilson, Read in Support of Motion.

AMENDED CERTIFICATE OF INCORPORATION

OF THE

NEW YORK ELECTRIC LINES COMPANY.

159 We, the undersigned, are six out of the nine directors of the New York Electric Lines Company, constituting two-thirds of the Board of Directors, and we do hereby certify that:

I. The written consent of persons owning at least two-thirds of the capital stock thereof has been procured to the objects and purposes of this amended certificate; and to the execution and filing thereof, as appears by the affidavit of three of the directors annexed hereto and marked Exhibit A, and which is hereby made a part of this certificate.

160 *Exhibit "C" Annexed to Affidavit of W. W. Wilson.*

II. The said corporation was organized in October, 1882, under Chapter 265 of the Laws of 1848, known as the General Telegraph Act, and the acts amendatory thereof.

III. The said corporation files this amended certificate to enable it to construct, lease, own, use and maintain lines of electric conductors not described in its original certificate of incorporation, and in addition to those therein described, and to join with other corporations in constructing, leas-
161 ing, owning, using and maintaining said lines, and to hold or own any interest therein, and to become lessees thereof, in accordance with the provisions of Article 8, Section 101, of the Transportation Corporations' Law, and for that purpose, pursuant to the provisions of said law, we do hereby execute and acknowledge this amended certificate.

IV. The general route of such lines not described in the original certificate of incorporation of said company, and the extreme points connected thereby, are described as follows:

162 (a) Lines of electric conductors along and over the various streets, avenues and highways in the City of Brooklyn as it existed in the year 1882, from near the Fulton Ferry in said city, and extending north and eastward to Newtown Creek and the boundary line between the counties of Kings and Queens, and from the said ferry to the several points in the boundary lines of said city as it existed in the year 1882, eastward, southward and westward to Bay Ridge and New York Harbor, and within the general limits described to connect by any and all streets and avenues the sev-

eral points with each other, and with station, central offices and depots within the said city, and the said stations, offices and depots with public and private buildings, residences and offices and all other places in the said city.

(b) Lines of electric conductors along and over the various streets, avenues and highways in the City and County of New York as it existed in the year 1882, from the Battery at the southern end of Manhattan Island to connect by the streets leading north to northeastward, with offices and depots at central points within the said city, and from these offices and depots to connect by any and all the streets, avenues and roads with all points in the northerly and easterly boundary lines of the said City and County of New York as it existed in the year 1882 generally, to wit: by Riverdale Avenue and adjacent streets with Mount St. Vincent, and by Broadway, Macomb's Dam Road, Central Avenue and adjacent channels of communication with the boundary line of the Town or City of Yonkers and Woodlawn Heights, and along and over the various streets, avenues and roads of Harlem, Morrisania and Tremont with points on the Bronx River and the boundary of the County of Westchester, and further to connect the several offices, depots and points within the outlying limits defined, with each other and with public buildings and offices, and with private offices and residences, and all other places within the said City and County of New York. 164 165

(c) Lines of electric conductors from all points on the periphery or external boundary of the cities of New York and Brooklyn as they existed in the year 1882, to all points and places in the City and

166 *Exhibit "C," Annexed to Affidavit of W. W. Wilson.*

State of New York and the adjoining State of New Jersey, and from thence to all points and places in the United States and Canada, and the route of said lines shall be along, under and above the streets, avenues, highways and other public property, and over and under private property, and under and across and over the waters which separate any of the aforesaid places.

IN WITNESS WHEREOF we have executed and acknowledged this amended certificate in duplicate, and have hereunto set our hands this 9th
167 day of July, 1907.

RICHARD H. MONTGOMERY (L. S.)
HERMAN G. LOEW (L. S.)
WAYNE W. WILSON (L. S.)
D. A. REYNOLDS (L. S.)
EDWIN M. MILLARD (L. S.)
DAVID J. TINGLEY (L. S.)

State of New York, } ss.:
County of New York, }

168 On this 9th day of July, 1907, before me personally came Richard M. Montgomery, Herman G. Loew, Wayne W. Wilson, D. A. Reynolds, Edwin M. Millard and David J. Tingley, to me known and known to me to be the persons named in and who made and signed the foregoing amended certificate, and severally duly acknowledged to me that they had made, signed and executed the same for the uses and purposes therein set forth.

M. B. BABCOCK,
(Seal of Notary) Notary Public,
New York County.

Exhibit A, Referred to in the Foregoing Exhibit C, Annexed to the Affidavit of W. W. Wilson, Read in Support of Motion. 169

State of New York,
County of New York, } ss.:

Edwin M. Millard, De Elbert A. Reynolds and Wayne W. Wilson, being duly sworn, each for himself, deposes and says that he is a director of the New York Electric Lines Company; that the persons who have made, executed and signed the foregoing certificate constitute two-thirds of the directors of such Company, and that the written consent of persons owning at least two-thirds of the capital stock of such Company has been obtained for the carrying out of the purposes set forth in the annexed amended certificate. 170

EDWIN M. MILLARD,
DE ELBERT A. REYNOLDS,
WAYNE W. WILSON.

Severally sworn to before me this
9th day of July, 1907. 171

M. B. Babcock,
Notary Public,
New York County.
(Seal of Notary Public)

172 **Exhibit D, Annexed to the Affidavit of W. W. Wilson, Read in Support of Motion.**

Franchise of the New York Electric Lines Co.,
Granted April 10th, 1883.
Proceedings of the Board of Aldermen, Vol. 51, pp. 132 to 134.

RESOLVED, that permission be and hereby is granted to the New York Electric Lines Company, to *lay wires or other conductors of electricity in and through the streets, avenues and highways of*
173 *New York City* and to make connections of such wires or conductors *underground by means of the necessary vaults, test boxes and distributing conduits*, and thence above ground with points of ELECTRIC ILLUMINATIONS or of TELEGRAPHIC OR TELEPHONIC SIGNALS in accordance with the provisions of an "Ordinance to Regulate the Laying of Subterranean Telegraph Wires and Electric Conductors in the Streets of the City" passed by the Common Council and approved by the Mayor December 14, 1878, provided, however, and it is hereby ordained, and

174 RESOLVED, That whenever the said New York Electric Lines Company, in the progress of laying its lines of Electric conductors, shall be prevented or obstructed from placing its wires in the spaces which may have been generally selected under the ordinance passed and approved as aforesaid, by manholes or sewer, gas, steam, or water mains or other underground or pavement impediments, now and heretofore existing, then and *in such cases* the said Company may, *under the privileges hereby granted, vary the space elected* by adopting, appro-

priating and using equivalent and nearest practicable spaces as may be found necessary, and provided further, and it is hereby further

RESOLVED and ordained, that the connection vaults aforementioned may be extended underground no more than four feet in depth or two feet in any lateral direction beyond the limited spaces contemplated for the lines of wires in the ordinance passed and approved as aforesaid, and may be fitted with covers or other means of access at the level of the pavements of the several streets and avenues. 176

RESOLVED, that in addition to the requirements and provisions to be observed contained in the said ordinance, the said New York Electric Lines Company, as a further compensation for the opening and use of the streets of the City, shall pay into the City Treasury, within ten days after taking up the pavements, for each one thousand feet in length of trench, to be excavated, the maximum sum or sums of money which have been, or which may hereafter be required of grantees, or licenses to be paid under any general or special Ordinance of the Common Council heretofore enacted, authorizing the laying of Electric Conductors under the streets of the city. 177

RESOLVED, that the permission of the said New York Electric Lines Company hereby intended by the Common Council is conditioned that the said Company shall not transfer or dispose of the franchise hereby granted without the further authority of the Common Council, and that it will make no discrimination of individuals or corporations in the rental and use of its lines or wires which may be laid down hereunder.

178 *Exhibit "E," Annexed to Affidavit of W. W. Wilson.*

RESOLVED, that the City shall have the option, after the first day of January, 1885, to require the said New York Electric Lines Company to pay into the City Treasury two per cent. of its gross receipts derived from the rental of its wires under the franchise hereby granted in lieu of the donation to the City of the two wires in each line of conductors, as provided in the General Ordinance passed and approved as aforesaid, and said option may be declared at any time after the said first day of January, 1885, by resolution of the Common Council.

179

Exhibit E, Annexed to the Affidavit of W. W. Wilson, Read in Support of Motion.

ACCEPTANCE OF FRANCHISE
NEW YORK ELECTRIC LINES COMPANY
April 16th, 1883. Vol. 51, pp. .

Alderman Fitzpatrick moved that the communication from the N. Y. Electric Lines Company, dated April 16, 1883, accepting the grant from the
180 City, presented in the Board, April 24th, 1883, and ordered on file, be taken from on file and printed in full in the City Record and in the minutes.

The President put the question whether the Board would agree with said motion.

Which was decided in the affirmative.

The said communication was as follows:

To the Honorable
The Common Council of the City of New York:

WHEREAS the Honorable the Board of Aldermen on March 13th, 1883, adopted the ordinance

embracing the resolutions hereto annexed, marked A granting of the New York Electric Lines Company a franchise to lay wires and other electric conductors under the streets of New York City, and

WHEREAS, the said Board, on April 10, 1883, reconsidered the said ordinance, and again adopted the same notwithstanding the objections of his Honor, the Mayor, and

WHEREAS the said ordinance embraces in its 182
resolutions certain requirements, provisions, restrictions, conditions, limitations and extensions not provided in the general ordinance of the Common Council, approved December 14, 1878, under which the franchise granted by the ordinance aforesaid hereto annexed, it is to be enjoyed and exercised by the said New York Electric Lines Company.

NOW, THEREFORE, the said New York Electric Lines Company by these presents accept the

said franchise as contained in the ordinance and 183
resolutions adopted by the Honorable the Board of Aldermen, April 10, 1883, and agrees to, assumes and obligates itself in the observance of all the requirements, provisions, restrictions, conditions and limitations contained in the said last mentioned ordinance as adopted April 10, 1883, as well also as to the provisions, conditions and obligations of the said general ordinance approved by the Mayor December 14th, 1878.

IN WITNESS WHEREOF the said New York Electric Lines Company has caused its corporate

184 *Exhibit "F," Annexed to Affidavit of W. W. Wilson.*

name to be signed hereto by its President, duly authorized thereto, and its corporate seal to be hereto affixed by its secretary thereto duly authorized this sixteenth day of April, A. D. 1883, at the City of New York.

NEW YORK ELECTRIC LINES COMPANY
by SIDNEY F. SHELBURNE, Pres.
ATTEST:- H. P BRUSH, Sec'ty.

Exhibit F, Annexed to the Affidavit of W. W. Wilson, Read in Support of Motion.

185

ORDINANCE PASSED DECEMBER 14TH, 1878.
PROCEEDINGS OF BOARD OF ALDERMEN.
Vol. 46, p. 407.

No telegraph line or electric conductor shall be laid under the streets of this City at such depth from the surface that the necessary excavations incident to laying or repairing the same shall expose or endanger any water or gas pipes, sewers or drains, or any parts thereof.

Such wires or conductors shall in no case be placed at a greater distance from the curbstones
186 separating sidewalks from carriage way than four feet, except in crossing streets, running transverse to the direction of said lines, when such crossing shall be made in the shortest straight line, or in making necessary connections with buildings and stations.

The method employed in laying said conductors shall be such that it will at no time be necessary to remove so much of the pavement or to make such excavation as to materially impede traffic or passage upon sidewalks or streets during operation of laying or repairing said conductors except when

in crossing streets transversely where it shall be permitted to remove the paving stone for a width not exceeding two feet and in the nearest straight line from corner to corner. In no case during the general hours of passing and traffic shall passage be interrupted thereby for a longer perior than one hour.

The work of removal and replacement of the pavements in any and all of the streets, avenues, highways and public places in and through which the wires of any telegraph company shall be laid, shall be subject to the control and supervision of 188
the Commissioner of Public Works. Excavations in any and all of the unopened streets, avenues, highways or public places shall also be subject to like control and supervision.

The space selected for placing said wires in every case being limited as to direction and general position by the foregoing provisions, shall not exceed two feet in width by two feet in depth.

Grantees under this ordinance shall be required within six months after such permission shall be granted to file with the County Clerk, maps, diagrams and tabular statements indicating the 189
amount and position of the spaces proposed to be occupied by them, and their rights and privileges upon this ordinance shall be confined to the spaces, positions and localities as indicated by said maps, diagrams and statements.

That whenever routes of several wires shall be laid by and under the provisions of this ordinance that one wire in each route shall be reserved for the use of the Police and one for the Fire Alarm Telegraph and the use of the same shall be donated to the City and County of New York by the parties laying such lines or wires free of any price or charges therefor.

190 **Exhibit G, Annexed to the Affidavit of W. W. Wilson, Read in Support of Motion.**

MAP OF NEW YORK CITY.

Showing the streets, avenues and highways in the city proposed to be occupied by the New York Electric Lines Company, and in which the said Company has designated and located the spaces for its lines of electric conductors, being spaces of two feet wide and variable depths, with also spaces at the street corners for connection boxes on each side
191 of every street, avenue and highway, shown on this map, and approximately indicated hereon by red lines; said spaces of two feet wide are designated as follows, to wit:

The width of space being between a width of two feet from the curbstone of each side of every street, avenue and highway in the city and a width of four feet from said curbstones and on each diagonal corner of such streets, avenues, highways and public places, the appropriate space for test distributing and connection boxes as indicated in the separate diagram, plans and specifications herewith filed.

192 WITNESS the corporate name of the said company hereunder subscribed, and its corporate seal hereto affixed.

NEW YORK ELECTRIC LINES COMPANY.
By SIDNEY F. SHELBOURNE,
President.

(Seal)
Attest:
H. P. BRUSH,
Secretary.

Exhibit "G," Annexed to Affidavit of W. W. Wilson. 193

Filed by the New York Electric Lines Company in accordance with the provisions of Article XLI of Chapter VIII of the revised ordinance of 1880 of the City of New York and by virtue of an ordinance of the Common Council, passed April 10, 1883, granting a franchise to the said Company to lay electric conductors under the streets of the City.

KNOW ALL MEN BY THESE PRESENTS that the New York Electric Lines Company, a corporation under the Laws of the State of New York, 194
to whom was granted on the 10th day of April, 1883, by the Hon. the Board of Aldermen of the City of New York, notwithstanding the objection of his Hon. the Mayor thereto, a franchise to lay wires and other electric conductors under the streets of the city, in conformance (except in certain particulars) with the provisions of a general ordinance of the Common Council of the City of New York, passed by the Board of Aldermen, December 10, 1878, and approved by the Mayor, December 14, 1878, hereby and herewith files in the office of the County Clerk, its maps, diagrams, tabular statements, and general specifications, as required by the 195
said ordinances being Article XLI of Chapter VIII of the revised ordinance of 1880. That is to say, the map herewith indicates the streets of the city in which the said Company designated its spaces to be reserved for the use of its lines of wires and other electric conductors, being all the streets, avenues and highways of the City, the said streets, avenues and highways, whether as yet open to the public or not, and being a space of two feet wide by two feet in depth as provided in the said general ordinance. The location of said

196 *Exhibit "G," Annexed to Affidavit of W. W. Wilson.*

space in the width of the streets, avenues and highways of the city, is as follows, to wit:

Measuring from the curbstones on either side of the said streets, avenues and highways, the space of two feet is omitted. The spaces proposed to be occupied by the said Company and hereby designated, located and appropriated for such occupation and use, are the spaces immediately alongside of the said width of two feet omitted, and extending to a width of four feet from the curbstones toward the middle of the streets. As to
197 depth, the spaces of two feet proposed to be occupied and hereby designated, located, adopted and appropriated by the said Company, are as follows, to wit:

Within the lines for width as above designated the general level or plain of the underside of the paving blocks or stones is taken as the reference plain of measurement. The first ten inches of earth below this plain is omitted or rejected. The two feet in depth proposed to be occupied and hereby designated, located and appropriated by the said Company, is the two feet of space immediately
198 below the said ten inches of earth omitted or rejected. The said Company reserves the right under the special provisions of the ordinance of April 10, 1883, granting the franchise to the Company to vary either in width or depth the said spaces in such streets or localities where it may be found that there were now existing at the filing of these designations, obstructions or impediments of any kind injuring, interrupting or rendering impracticable for use, the spaces hereby designated, and generally where the lines of wires cross each other at the junctions of the streets, it is understood and reserved that spaces are appropriated so that one

of the said lines of cables or wires may pass under the other, regard being had in this particular to the provisions of the said general ordinance, and that the spaces hereby designated for the lines of wires in crossing each other shall not injure, interrupt or interfere with the general order and arrangement of the ordinance, of existing sewer, drain, gas pipes or their necessary connectors.

The diagrams herewith filed, in which the principal figures are marked Exhibits A and B respectively, will serve to indicate clearly the location of spaces and their extent in depth and width hereby 200. designated, adopted and appropriated by the said Company for its test boxes or otherwise, called distributing and connection boxes at the junctions or corners of the several streets, avenues and highways of the city. Those boxes to admit of ready access by manholes, for connecting all wires of one section of electric cable to the other, must be of a width and depth considerably greater than the width and depth of the spaces generally reserved, and hereinbefore designated for the cables and enclosures, forming the sections of the lines of wires. The said company therefore as provided 201 for width and depth of the said boxes in the ordinance granting to the Company its franchise aforesaid, hereby designates, adopts, locates and appropriates spaces for its said test or distributing and connection boxes as follows:

That is to say as shown on the diagram herewith filed, the said Company hereby designates, adopts and locates the corners diagonally of every street, avenue, thoroughfare, public place and highway in the general lines of the crossing of the lines of wire cables, as may appear from the foregoing designations of places and the diagrams

aforesaid hereto annexed. The tops of the said boxes are to be generally 8 inches below the assumed average plain of the underside of the paving stones, except the portion forming the manholes, which reaches to the surface of the street pavements. For depth, the said boxes extend to a depth of four feet below the lower limit for depth of the spaces, hereinbefore designated, located and adopted for the lines of cables or wires for width or sideways, the said boxes are two feet wider in each direction both toward the middle of the
203 streets and towards the curbstone than the spaces two feet wide already herein designated for the cables or lines of wires, except in the sewertraps or pits at the corners of streets required, that the inner middle portion of the boxes should be rounded and scanted on the inside, spaces to conform to the walls of the said existing sewertraps; and the spaces, at the corners of the streets to permit and accommodate the said boxes of the depth, width and general extent as herewith just specified, are herein and hereby and as generally illustrated in the diagram herewith filed, named, located, desig-
204 nated and appropriated by the said Company, in the laying and use of its lines of electric cables or wires, provision being had that the diagonal corners of the said streets, avenues and highways are, for the streets, avenues, thoroughfares and highways, lengthwise with the city, the northwest and southwest corners, which said locations will also control and be the adoption for distributing the test boxes for cables and wires in the transverse streets.

The plans of the said Company in general terms, embrace the laying under the streets, maintaining and using cables or assemblages of electric wires,

in number from a single wire upward in any particular locality, with distributing connections from the boxes aforesaid, under the pavements or sidewalks into the buildings of each block or with lamps, elevated stations, or masts supporting apparatus for lighting or telegraphic signal above the streets. The said Company reserves the right to use and herein and hereby designated the use of either tubes, troughs, or boxes made of wood, stone, concrete, cement, asphalt, or metal to contain and close, protect, support and afford access to its cables or wires to be laid in the spaces herein- 206
before designated. Generally the wires for distributing the electric currents will be taken from the boxes at the street corners aforesaid, under the sidewalks and through the cellars of the cornor buildings into the interior of the blocks in iron or lead tubes, and distributed about the interior through the air from a fixed point or support to the rear of the houses situated in said block.

TABULAR STATEMENT.

No. of streets, avenues, highways, etc. to be occupied ..... 1 ..... all 207

Locations in the same for lines of wires.....
.....on both sides

Locations of connection boxes.....
.....N. E. & S. W. Corners

Width and depth of spaces for lines of wires
.....2 ft. by 2 ft.

Width and depth of spaces for connection boxes
.....6 feet 2" deep by 6 feet wide

Number of cables in spaces 2 ft. by 2 ft.....
.....1 to 16

Number of wires in each cable .....
.....4 to 250

208 *Exhibit "H," Annexed to Affidavit of W. W. Wilson.*

In verification of the location of spaces as aforesaid and in the witness of all and singular, the statements, tables, designations, diagrams, descriptions and exhibits hereinbefore and herewith contained, attached and filed in the office of the County Clerk of the City and County of New York, the said company, the New York Electric Lines Company, has hereunder caused its corporate name to be signed by its president, duly authorized thereto, and its corporate seal to be hereto affixed and attested by its secretary, duly authorized to affix and
209 attest the same, this 15th day of May, A. D. 1883.

NEW YORK ELECTRIC LINES COMPANY,
By SIDNEY F. SHELBOURNE,
President.

(Seal) Attest:

H. P. BRUSH,
Secretary.

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210 **Exhibit H, Annexed to the Affidavit of W. W. Wilson, Read in Support of Motion.**

TO THE EMPIRE CITY SUBWAY COMPANY (Limited).

The New York Electric Lines Company by this application respectfully shows:

FIRST.—That it is a corporation duly organized and now existing under and pursuant to Chapter 265 of the Laws of 1848 as amended, having lawful power to own, construct, use, maintain and lease

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lines of wires or other electric conductors for telegraphic and telephonic communication to be placed under the pavements of the streets and avenues of the City of New York.

SECOND.—That heretofore and on or about the 10th day of April, 1883, the Board of Aldermen of the City of New York adopted an ordinance subsequently formally accepted by the applicant, whereby there was completed in the applicant a right "to lay wires or other conductors of electricity in and through the streets, avenues and 212
highways of New York City, and to make connections of such wires or conductors underground by means of the necessary vaults, test boxes and distributing conduits, and thence above ground with points of electric illumination of telegraphic or of telephonic signal," subject, however, to certain conditions precedent with all of which the applicant has complied, and also certain conditions subsequent with all of which the applicant hereby declares its readiness, willingness and ability to comply.

213

THIRD.—That under the existing laws regulating the construction, erection, stringing, laying or maintaining of low tension electrical conductors, poles, wires and other electrical devices or fixtures, it is entitled to have assigned to it the necessary and reasonable space in the subways owned by the Empire City Subway Company (Limited) for its electrical conductors to be used by it in furnishing electric energy for the transmission of telegraphic and telephonic messages within the territory prescribed by the Board of Alderman of the City of New York heretofore referred to, and if at any time

the space in such subways shall not be sufficient for its use, then to have provided for it the additional space needed, by the construction, maintenance, equipment and operation of additional subways.

FOURTH.—The applicant, the New York Electric Lines Company, hereby makes application to the Empire City Subway Company (Limited) for space in its subways, together with the necessary laterals and connections for block or building distribution, for the purpose of placing electrical conductors therein, and connecting the same with the central office and the block and buildings in the territory adjacent thereto, viz:

No.	On	From	To	Ducts
1.	Cedar St.	Church St.	Nassau St.	2
2.	Church St.	Dey St.	Cedar St.	1
3.	Nassau St.	55 Liberty St.	Cedar St.	1
4.	Nassau St.	Cedar St.	Pine St.	5
5.	Nassau St.	Pine St.	Wall St.	7
6.	Broad St.	Wall St.	Exchange Place	11
7.	New St.	Wall St.	Exchange Place	1
8.	New St.	Exchange Place	Beaver St.	4
9.	Beaver St.	Produce Exchange Bldg.	Broad St.	5
10.	Broad St.	Stone St.	Beaver St.	1
11.	Pearl St.	197 Pearl St.	Pine St.	2
12.	Pearl St.	Pine St.	Wall St.	4
13.	Pearl St.	Wall St.	Beaver St.	4
14.	Beaver St.	Hanover St.	William St.	7
15.	William St.	#1 Hanover Square	Beaver St.	1
16.	Beaver St.	William St.	Broad St.	9
17.	Broad St.	Exchange Place	Beaver St.	14
18.	Beaver St.	Pearl St.	Hanover St.	6
19.	Hanover St.	Nat'l City Bank Bldg.	Beaver St.	1

all in the Borough of Manhattan, New York City.

FIFTH.—Application is further made by the New York Electric Lines Company for each of the above sections of conduit space numbered from 1 to 19 inclusive as described in the preceding paragraph, and gives notice of its intention to apply for further space in the conduits of the Empire City Subway Company (Limited) throughout the territory covered by its franchise.

SIXTH.—In compliance with the rules and regulations in force in the City of New York relative to applications for space in the subways, the applicant states as follows: 218

A. Its name is "New York Electric Lines Company."

B. The purpose for which the conduit or conduits is desired is to carry wires transmitting an electric current by which to operate telephones.

C. The number of conductors proposed to be placed in the conduits is 1,000 (525 pairs) or less, arranged symmetrically in a single cable with a lead covering. The size of the conductors will be 642.4 circular Mils, and the largest diameter of the cable including the lead covering will not exceed 2¾ inches. There will be around each conductor a double insulation of paper and around the whole a further insulation of paper and around that a lead covering not more than one-eighth of an inch thick 219

D. The maximum electro-motive force to be used in said conductors is 40 volts; the quantity of current will not exceed one (1) ampere, and the initial insulation resistance per mile in megohms will not exceed 200.

220 *Exhibit "H," Annexed to Affidavit of W. W. Wilson.*

SEVENTH.—Herewith find legal tender United States Currency for Five Thousand ($5,000) Dollars with which to pay one year's rental for the use of the desired space or ducts in the subway or subways, the amount herewith tendered being largely in excess of the rate charged for use of the space desired, and the New York Electric Lines Company is prepared, ready, able and willing to furnish a bond with a good, sufficient, and satisfactory surety company, as surety, in such amount as may be required for the payment of such rent for
221 an additional five years.

Should the undersigned Company not hear from the Empire City Subway Company (Limited) on or before Saturday, June 18th, 1910, granting its application for space as aforesaid it will be deemed a refusal on the part of the said Empire City Subway Company (Limited) to grant this application.

Dated the 7th day of June, 1910.

NEW YORK ELECTRIC LINES COMPANY.
WAYNE W. WILSON,
222 Secretary.

Office and Post Office Address,
No. 30 Church Street,
New York City.

Exhibit J, Annexed to the Affidavit of W. W. Wilson, Read in Support of Motion.

223

Law Offices
of
ROBERT D. MURRAY
and
J. ASPINWALL HODGE
RICH W. HOLLAMAN

Telephone 1315 Rector
Cable Address "Orwood"

224

HANOVER BANK BUILDING
5 Nassau and 11 Pine Streets

New York, June 24, 1910.

In re N. Y. Electric Lines Co.
Empire City Subway Company (Limited),
18 Cortlandt St., New York.

Dear Sirs:

The New York Electric Lines Company has had no word from you since it filed its application with you on June 8th, 1910, to be accorded space for its electrical conductors in the subways which you hold for the public use. 225

On behalf of that company I desire to notify you that we shall hold you liable in damages for not promptly supplying it with the space applied for.

Knowing that you were quite familiar with the history of the New York Electric Lines Company, ever since or before your counsel on March 10, 1906, filed a brief with the Corporation Counsel, the New

226 *Exhibit "J," Annexed to Affidavit of W. W. Wilson*

York Electric Lines Company did not feel it necessary in the absence of any request from you to hand you copies either of its certificate of incorporation or its franchise.

You have undoubtedly seen, and your counsel are familiar with, the decisions in the courts relating not only to the franchise of the applicant company, but also relating to other questions, which decisions establish precedents and quite overrule the contentions made by your company in the brief referred to. For your convenience, however, I herewith
227 transmit, notwithstanding that you have not asked for them, copies of the following documents, which are most of them matters of public record:

1. Copy of certificate of incorporation of the New York Electric Lines Company.

2. Copy of amended certificate.

3. Copy of franchise granted by the Board of Aldermen of the New York Electric Lines Company.

228 4. Copy of the acceptance thereof as evidenced by the minutes of the Board of Aldermen.

I refer you also for further facts, references to public documents, and for the law applicable to duties of the Empire City Subway Company (Limited) in the premises, to People ex rel N. Y. Electric Lines Co. vs. Ellison, 51 Misc., 413 and 188 N. Y., 523; People ex rel. N. Y., Electric Lines vs. Squire, 107 N. Y., 593 and 145 U. S., 175. Also to the Matter of the Long Acre Electric Light and Power Co. vs. The Consolidated Telegraph and

Electrical Subway Co., 51 Misc., 407; 117 App. Div., 80, 188 N. Y., 361.

In view of the fact that the Empire City Subway Company is charged with a public duty in the premises, is in the exercise of a public franchise, and must, by the very law of its being, treat all applicants alike, may we not at least expect the courtesy of an immediate reply to this communication?

Yours truly,

230

J. ASPINWALL HODGE,
Attorney and of Counsel for the
N. Y. Electric Lines Company.

Exhibit K, Annexed to the Affidavit of W. W. Wilson, Read in Support of Motion.

NEW YORK ELECTRIC LINES COMPANY

OFFICE 32 BROADWAY, 231

NEW YORK, June 17, 1907.

TO THE EMPIRE CITY SUBWAY COMPANY (Limited):

The New York Electric Lines Company by this application shows:—

1. That it is a corporation duly organized and now existing under and pursuant to Chapter 265 of the Laws of 1848 as amended, having lawful power to own, construct, use, maintain and lease lines of wires or other electrical conductors for telegraphic and telephonic communication to be

placed under the pavements of the streets and avenues of the Borough of Manhattan and elsewhere.

2. That heretofore and on or about the 10th day of April, 1883, the Board of Aldermen of the City of New York adopted an ordinance subsequently duly accepted by the applicant, whereby the applicant became possessed of the right "to lay wires or other conductors of electricity in and through the streets, avenues and highways of New York City, and to make connections of such wires or conductors underground by means of the necessary vaults,
233 test boxes and distributing conduits, and thence above ground with points of electric illumination of telegraphic or of telephonic signal," subject, however, to certain conditions precedent with all of which the applicant has complied, and also certain conditions subsequent with all of which the applicant hereby declares its readiness, willingness and ability to comply.

3. That under the existing laws regulating the construction, erection, stringing, laying or maintaining of low tension electrical conductors, poles, wires and other electrical devices or fixtures, it is
234 entitled to have assigned to it the necessary space in the subways owned by the Empire City Subway Company (Limited) for its electrical conductors to be used by it in furnishing electric energy for the transmission of telegraphic and telephonic messages within the Borough of Manhattan and elsewhere.

Therefore the applicant, the New York Electric Lines Company, hereby makes application to the Empire City Subway Company (Limited) for space in its subways for the purpose of placing electrical conductors therein extending from the building known as the Hudson Building, No. 32 Broad-

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way and the Building known as the Hanover Bank Building, of No. 5 Nassau Street and No. 11 Pine Street, both in the said Borough of Manhattan, and in compliance with the rules and regulations in force in the City of New York relative to applications for space in the subways, the applicant states as follows:

A. Its name is "New York Electric Lines Company."

B. The purpose for which the conduit or conduits is desired, is to carry wires transmitting an electric current by which to operate telephones 236
establishing means of communication between the said buildings.

C. The number of conductors proposed to be placed in the conduits are 800 (400 pairs) arranged symmetrically in a single cable with a lead covering. The size of the conductors will be 642.4 c.m. and the diameter of the cable including the lead covering will be 2¾ inches. There will be around each conductor a double insulation of paper and around the whole a further insulation of paper and around that a lead covering one-eighth of an inch thick.

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D. The maximum electro-motive force to be used in said conductors is thirty (30) volts.

Herewith is a cashier's check for Eight hundred ($800) Dollars with which to pay one year's rental for the use of the desired space in the subway, the amount hereof being largely in excess of the rate for the use of the space desired and largely in excess of a reasonable charge for the said space, and the New York Electric Lines Company is prepared, ready, able and willing to furnish a bond with a good, sufficient and satisfactory surety company, as surety, in such amount as may be required

for the payment of the rent for said space for an additional five years.

Should the undersigned applicant not hear from the Empire City Subway Company (Limited) within a reasonable time, granting its application for space as aforesaid, it will be deemed a refusal on the part of the said Subway Company to grant its application.

Dated this 17th day of June, 1907.

NEW YORK ELECTRIC LINES COMPANY

239 by

WAYNE W. WILSON,

Sec'y.

J. ASPINWALL HODGE,
Counsel of the Company,
5 Nassau St.,
New York City.

Exhibit L, Annexed to the Affidavit of W. W. Wilson, Read in Support of Motion.

240 EMPIRE CITY SUBWAY COMPANY (Limited)

Executive Offices,

15 Dey Street,

New York, June 27th, 1907

New York Electric Lines Company,
32 Broadway, New York City.

Gentlemen:—

Your communication addressed to this Company, dated June 17th, 1907, wherein application is made for space in the subways of this Company for the

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purpose of placing electrical conductors therein, extending from the building known as the Hudson Building, No. 32 Broadway to the building known as the Hanover Bank Building, of No. 5 Nassau Street and No. 11 Pine Street, within the Borough of Manhattan, has been received.

Without raising any of the questions which we are advised might be raised with respect to the correctness of the statements contained in the first three paragraphs of your application, we beg to state that this Company is unable to lease or assign space in its subways in which to place electrical conductors extending between the points mentioned by you, so as to enable you to operate telephones establishing means of communication between the two buildings mentioned in your application,—Hudson Building and the Hanover Bank Building, for the reason that this Company has not in its subways the unoccupied space which would be required to accommodate the electrical conductors for which you desire to obtain space, and the space which would be required for your purposes could only be furnished by the construction of new subways. For the construction of new subways, as you doubtless know, the order of the Commissioner of Water Supply, Gas and Electricity is necessary.

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In confining this answer to your application to a statement of our inability to lease or assign the space applied for, and the reasons of such inability, we do not waive any objections that might be made upon the ground of the incorrectness of any of the statements made in your application as to your lawful powers or authority. We simply refrain from making such objections, for the reason that it seems unnecessary to make them at this time, when your

244 *Exhibit "M," Annexed to Affidavit of W. W. Wilson.*

having or not having such powers or authority could make no difference in our course.

We return herewith the check which was enclosed with your letter.

Yours truly,

JOHN H. CAHILL,
1st Vice President & Secretary.

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Exhibit M, Annexed to the Affidavit of W. W. Wilson, Read in Support of Motion.

July 11, 1907.

Empire Subway Company, Ltd.
Executive Office, 15 Dey Street,
New York City.

Dear Sirs:

246 We have your letter of June 27th and note the statement therein contained, that your Company

> "Has not in its subways the unoccupied space which would be required to accommodate the electrical conductors for which you desire to obtain space."

Kindly advise us at once how much space you have in the conduits between the buildings referred to in our communication. Information in this regard may enable us to frame an application for more limited accommodation than asked for in our previous communication.

We are also desirous of being informed at once as to what vacant conduits you have in the Borough of Manhattan. But if the furnishing of such comprehensive information would consume any considerable period of time, we would prefer to be immediately informed of any stretch of one-half a mile or more in the City where there is a vacant conduit. If we can be furnished with information respecting the distance of one or more of such stretches, we can see no reason why the income of your Company should not be increased by your acceptance of the New York Electric Lines Company as a tenant for one or more of such conduits. 248

Yours truly,

NEW YORK ELECTRIC LINES CO.
J. ASPINWALL HODGE, Attorney

Exhibit N, Annexed to the Affidavit of W. W. Wilson, Read in Support of Motion.

EMPIRE CITY SUBWAY COMPANY (Limited) 249

Executive Offices,

15 Dey Street.

New York, July 24th, 1907.

New York Electric Lines Company.
J. Aspinwall Hodge, Esq., Attorney.

Dear Sir:

We reply to your letter of the 11th inst., without conceding that your company has any lawful right to occupy any space in the subways, or waiving any

right to raise that question at any time hereafter.

There is no unoccupied space extending throughout the entire length of the conduits between the buildings referred to in your previous communication.

To prepare a statement as to what vacant conduits we have in the Borough of Manhattan would require months and a great deal of labor.

Your request to be advised of any stretch of half a mile or more in the city where there is a vacant conduit is not, in our judgment, authorized by the
251 statute or the rules and regulations of the Department, and does not seem to us to be information which this company should or properly can give. At the same time we beg to advise you that this company is ready at any time to act upon any application made within the rules and regulations of the department by any company authorized to occupy space in the subways for its corporate purposes.

We are

Yours respectfully,

252 PHILIP V. R. VAN WYCK,
Second Vice-President.

Exhibit O.

This exhibit consists of several large and bulky maps which will be produced upon the argument, but are too large to be reproduced here.

Affidavit of George L. Weed, Read in Support of Motion. 253

NEW YORK SUPREME COURT.

COUNTY OF NEW YORK.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited) 254

State of New York, County of New York, } ss.:

George L. Weed, being duly sworn, says:

1. I have been a resident of the City and Borough of Brooklyn all my life, and in the year 1882 I became one of the incorporators of the New York Electric Lines Company, as is shown in the Certificate of Incorporation. I was intimately acquainted with Sidney F. Shelbourne, the President of the Company, until the time of his death. He was killed in an electrical accident in the American Institute Fair in this city in 1887. 255

2. During the first year of the Company's existence, and during every year thereafter, down to the time of Mr. Shelbourne's death, he was actively engaged in the factory of the Company in Greenwich Street, near Fulton, and also in the offices of the

256 Company at 11 Gold Street, and afterwards in the Queen Building on Wall Street, where offices were maintained for three years, and again in Gold Street, down to the time of the fire presently to be referred to. The rental of the offices in the Queen Building began on the 1st of May, 1883, and terminated on the 1st of May, 1886, and the rental was $1,500 a year. These offices were occupied solely by the New York Electric Lines Company.

257 3. The work conducted by the Company under Mr. Shelbourne's directions at the shop or factory in Greenwich Street, during the first year, consisted in constant experiments with insulating material. One of the materials he was using in his experimental and constructive work there was known as petrapita. This was the name given to it by Mr. Shelbourne, as it was his invention, except in so far as he assigned it, with all other inventions, to the New York Electric Lines Company for use in the cities of New York and Brooklyn.

258 4. He also during the first year (1882-3) was to my knowledge actively engaged in the preparing of papers for the Patent Office embodying the improvements and inventions he was making for underground electric construction.

5. Mr. Shelbourne was an attorney-at-law and a patent solicitor and acted personally for himself and the Company in procuring the patents which were afterwards assigned to the Company. After his death I was appointed his administrator and I discovered that he had not executed an assignment of the patent rights; although all the patents, improvements and inventions made by Mr. Shel-

bourne were the property of the Company for use in the cities of New York and Brooklyn, and the stock of the Company was in part issued for those patent rights under an agreement with the said Shelbourne. 259

6. I therefore executed and delivered an assignment to the Company, a copy of which is hereto annexed. It is recorded in the United States Patent Office in Volume B 39 of Assignments, page 278, on the 8th day of October, 1888.

7. I was Treasurer of the Company from its organization down to the time when Shelbourne died, and after that I was both Secretary and Treasurer down to the regular annual meeting of the Company in 1905. During the entire period that I was an officer of the Company, I attended each of the annual meetings of the Company, and I think I was present at all the meetings of the Board of Directors. During the first years of the Company's existence, and during the entire period of Mr. Shelbourne's life the directors' meetings were frequent. I am unable to say how frequent, because the records of the Company were burned in a fire which occurred at 11 Gold Street. The fire was in the building next door, but spread into the offices of the Company and burned all their records and a considerable amount of my own property. The Company continued to occupy the offices and a meeting of the directors was held in them on March 14, 1887, since which time the minutes are intact. 260 261

8. As Treasurer of the Company I am able to state of my own knowledge that during the first year of the Company's existence there was spent in

262 the experimental and constructive part of the Company's business a large sum of money, certainly upwards of $30,000, and as far as I am able to calculate at this time without records, I should say it was approximately $50,000. This money was subscribed largely by the incorporators and directors of the Company. Among others, Mr. Warren, I know, paid $100 in cash for the first certificate of stock issued to him May 1st, 1883, and he continued to make contributions to the Company during the first year and in frequent years, in all aggre-
263 gating upwards of $12,000. I personally contributed during the first year a sum in excess of $30,000.

9. These moneys were contributed by us because of our confidence in Mr. Shelbourne's ability and in his belief (although he was opposed by many experts) that underground electrical insulation was possible and was necessary in large cities. In that belief we continued to contribute to the Company large sums of money during the entire period of our connection with it, and never during my connection with the Company did it ever abandon its
264 intention of constructing conduits under its franchise in the streets of New York City.

10. I am familiar with the endeavors upon the part of the Company to secure a franchise and the efforts made by myself and my associates, and especially by Mr. Shelbourne, in securing the passage in the Common Council of a franchise and of afterwards securing its passage a second time, the first resolution having been vetoed by Mayor Edson.

The Company accepted the franchise.

I know that the map required to be filed by the Company was prepared, for I directed its prepara-

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tion and I paid for it, and I am informed that Mr. Shelbourne personally filed the map in the County Clerk's Office. The map cost $300. I saw it both before it was filed and after it was filed during the month of May, 1883.

11. During all the years from 1883 to 1892, I am entirely familiar with the efforts which were made by the Company to place wires underground and the efforts made in opposition to the Company by interested parties, some of which, I am informed, are set forth in other affidavits in the pending proceeding.

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12. In the year 1892 there was pending in the Supreme Court of the United States an appeal from a decision of the Court of Appeals of this State, in which the right of the Company to lay wires underground, and especially the right of the Company to compel Commissioner Squire to grant a permit was involved. I was at that time a member of the Legislature, representing the 11th District of Kings County. A bill was introduced which afterwards became Chapter 263 of the Laws of 1892. When I saw it I believed that it would seriously affect the rights of the New York Electric Lines Company, and I at once saw my fellow legislators and explained to them the situation, and expressed my dissent from the passage of any such act unless that company was excepted in some way from its provisions. I explained this to Mr. Timothy Sullivan, who was a member of the Legislature, and both he and I saw a number of the other Assemblymen, and some of the Senators, and explained to them how unjust it would be to pass an act affecting rights which were then in litigation and had

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268 been in litigation in the highest courts of this State and of the nation for some years. As a result of these conversations there was inserted in the bill and embodied in the act when it became a law, the following sentence:

> "This act shall not affect the rights of any corporation or individual inconsistent herewith respecting which rights any litigation is now pending in the Supreme Court of the United States."

269 The bill had been introduced and supported by the Board of Electrical Control, and I saw the various members of that board in reference to the insertion of this clause, and stated the purpose I had in insisting that the bill should be amended by its insertion, and they finally consented, and for the sole purpose of excepting the New York Electric Lines Company, which certainly, at that time, as well as at all other times, of which I am aware, was a corporation which was recognized as existing and doing business except in so far as it was prevented by the local authorities.

le Court
mandamus

270 13. After the passage of this act and the decision the other officers of the Company, was continuously engaged in a very careful examination, not only of the facilities for underground electrical connection offered by the companies then existing, but also of the public demand for such connections for telephonic purposes that seemed to exist. But we discovered that no comprehensive system of telephonic connections could be installed in New York until the patents of the multiple switchboard expired, which I am informed, did not occur until recently.

271

14. Annual meetings have been regularly advertised and held in January of each year as provided in the by-laws. At each of the annual meetings since the year 1887 more than 37,000 shares of stock were represented and sometimes over 49,000 were voted, out of a total of 50,000. Stockholders' meetings and directors' meetings have been held every year since the Company's existence, and directors and officers have been, during each year, duly elected, and have duly performed their duties.

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15. I know of my own knowledge that in every year since the Company's organization in 1882 down to January, 1905, all State and city taxes have been paid by the Company, including the franchise tax. I personally made all the reports to the Department of Taxes down to the year 1905.

16. I am well acquainted with Charles J. Warren, who was elected President of the Company in November, 1887, and am familiar with the contents of an affidavit which was made by him on the 11th day of May, 1906, which is on file among the papers of this court in a matter entitled "People ex rel. New York Electric Lines Company vs. William B. Ellison," a copy of which affidavit is hereto annexed. The allegations contained in it of which I have personal knowledge are true. Mr. Warren died since the making of said affidavit.

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GEORGE L. WEED.

Sworn to before me this
27th day of June, 1910.

LOWELL JOHNSON,
Notary Public,
(Seal) Greene County.

280 *Copy of Assignment Referred to in the Affidavit of George L. Weed.*

WHEREAS in pursuance of a certain agreement made by Sidney F. Shelbourne in his lifetime with the New York Electric Lines Company, a corporation under the laws of the State of New York, having its principal office for the transaction of business at 11 Gold Street in the City of New York.

NOW, THEREFORE, to all whom it may concern. BE IT KNOWN that for and in consideration of one dollar ($1) and other valuable considera-
281 tions, the receipt of which is hereby acknowledged and in pursuance of said agreement, I, the said George L. Weed, administrator of the estate of Sidney F. Shelbourne, deceased, have sold, assigned and transferred and by these presents do sell, assign and transfer unto the said New York Electric Lines Company, all the right, title and interest in and to the said inventions as secured to said Sidney F. Shelbourne by said various letters patent for, to and in the City and County of New York and the County of Kings in the State of New York, and for, to and in no other place or places,
282 the same to be held and enjoyed by the said New York Electric Lines Company within and throughout the above specified territory, but not elsewhere, for its own use and behoof and for the use and behoof of its successors and assigns to the full end of the term for which said letters patent are or may be granted, re-issued or extended as fully and entirely as the same would have been held and enjoyed by the said Sidney F. Shelbourne, had this assignment and sale not been made.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed my seal at the City of

Affidavit of Charles J. Warren, Referred to in the Affidavit of George L. Weed. 283

Brooklyn, in the State of New York, this 5th day of October, A. D. 1888.

GEORGE L. WEED,
Administrator of the estate of
Sidney F. Shelbourne, deceased.

In presence of

G. B. VAN WART.

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D. VAN WART.
Acknowledged before D. Van Wart.

Affidavit of Charles J. Warren, Referred to in the Affidavit of George L. Weed, Read in Support of Motion.

State of New York, }
County of New York, } ss.:

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Charles J. Warren, being duly sworn, says:

I was elected President of the New York Electric Lines Company on the 29th day of November, 1887, having been a director and a stockholder from the organization in 1882 and associated in the management of the Company with the then President, Sidney F. Shelbourne, who died just preceding my election as President. I continued to act as President until the year 1905, when William Graves, of this city, was elected as my successor upon my resignation.

286 *Affidavit of Charles J. Warren, Referred to in the Affidavit of George L. Weed.*

I am familiar with the affairs of the Company during the entire period of my connection with it, and I have read the affidavit of Wayne W. Wilson, verified the 11th day of May, 1906, and submitted herewith, and the statements therein contained so far as they relate to the proceedings of the Company during my connection with it are true, and during the entire period aforesaid I was active in the management of the Company and I know that the Company was actively engaged in
287 the prosecution of its business and never for one day abandoned its business or its duties under its charter, and up to the time of my resignation as President it had paid all State, County and City taxes, and I know of no reason why its charter or any franchise, license, permit or privilege owned by it should be in any way curtailed or forfeited.

I know that large sums of money were received by the Company from its stockholders and expended during the period I was director, and afterwards while I was President, in the prosecution of the business of the Company. My own personal
288 contributions to the treasury of the Company exceeded the sum of $15,000, and began when the Company was organized.

The Company was duly organized in October, 1882, under what is known as the "Telegraph Act of 1848" and at once actively began the business for which it was incorporated. At that time, the art of placing electric wires underground for electric purposes, was in its infancy and was not understood, and the insulation of wires as well as their proper protection from moisture and other elements was in its experimental stage. The above statements are made of my own knowledge, as at that

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time I constantly heard discussions, and the statements are further confirmed by the sworn testimony of experts taken several years afterward by the Board of Electrical Control of this city. In the course of said proceedings many experts of high standing testified that even at that time there were grave difficulties, some of them practically insurmountable and requiring a further development of the art. I refer to the minutes of that Board which are on file with Commissioner Ellison for they fully corroborate the above statements.

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In 1882 and 1883 the Company at once began active operations, in several different directions, in the transaction of its business. It entered into a contract with Mr. Shelbourne, wherein and whereby he agreed to assign to the Company all rights to any inventions which he had or which he might make which would be useful in the carrying on of the Company's business, and a considerable amount of the stock of the Company was issued to him for all patent rights which he might secure; but the use of the said patents and the inventions described in them was limited in said contract to the cities of New York and Brooklyn as they then existed.

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I do not know at what date the formal assignment of said patents was made by the said Shelbourne, who died in the Fall of 1887; but I do know that he always acknowledged that the patents for which he applied during the year 1883 were applied for by him on behalf of the Company in so far as they related to said two cities, and that he was under the obligation to make written assignments thereof at any time upon demand.

292 *Affidavit of Charles J. Warren, Referred to in the Affidavit of George L. Weed.*

I know further that from the time of the organization of the Company, it had a factory wherein the Company's employees under the direction of the said Shelbourne, constructed cables, conduits and other material for use in underground electrical equipment. Some of these cables and conduits are described in his letters patent of that and succeeding years. They consist not only of insulated cables and conduits with proper coverings, but also of carriers to draw the cables through the passages
293 in the conduits, and they also included insulating material and the methods of producing and making it. I know also that during this period many of the experiments made were successful and some of them were at first unsuccessful and were repeated until final results were obtained which were so satisfactory that Mr. Shelbourne reported that he had a system that was entirely practicable.

The Company made prompt application in the Spring of 1883 to the authorities of the City for a franchise, and in prosecuting the said application met much opposition, the same was finally granted,
294 was accepted by the Company, and the company thereupon immediately laid out a comprehensive system for conduits in the city and filed the necessary map in the County Clerk's office in the Spring of 1883. I do not remember the date, but I am assured by those who have recently seen the records in the County Clerk's Office that the same was filed on the 18th of May, 1883.

During the first year of the Company's existence, at least the sum of Ten thousand dollars was expended in and about the business of the Company, which was carried on at its factory on Greenwich Street and in its offices at 11 Gold Street and in the Queen Building, 37 and 39 Wall Street. I be-

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lieve a much larger sum was expended but I know at least Ten thousand was used in rental, experiments, construction of insulation material, cables, machinery to manufacture the same and in patent applications and fees, in lawyer's fees, in salaries and in other ways during the first year succeeding the organization of the Company.

CHARLES J. WARREN.

Sworn to before me this
11th day of May, 1900.

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EMMA DESHON,
Commissioner of Deeds,
New York City.

Affidavit of Jesse Larrabee, Read in Support of Motion.

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

In the Matter

of

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The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

City and County of New York, ss.:

Jesse Larrabee, being duly sworn, on his oath deposes and says:

1. I am an attorney at law and have been for over twenty-nine years last past.

2. In 1881 I was associated with Sidney F. Shelbourne and aided him in his efforts in connection with the business of the New York Electric Lines Company, both before its organization and continuously thereafter until the death of said Shelbourne in 1887, and have been a stockholder, and most of the time a director, of said Company, from its organization up to the present time, being at all times familiar with the operations and business thereof.

3. I was the Counsel of the Company during the
299 first year of its organization and thereafter. Mr. Shelbourne was a lawyer himself and both in the patent matters of the Company and in many other legal matters he did much that was ordinarily done by counsel.

4. Mr. Shelbourne's attention was called to the confusion existing in this city among the electric light, telephone, telegraph and similar Companies in this city about the year 1881, and realized that there would be a great growth in such business, involving the extension of electrical conductors throughout the city. To meet the requirements of
300 the existing and expected situation, said Shelbourne conceived the idea of a corporation to supply the underground electrical conductors for use by various electric companies in the City of New York, although at that time the underground electric communication was in its infancy and the art of distributing electric current except overhead by telegraphic wires was almost unknown. Many inventions, devices and new appliances now in general and common use were not then existent.

5. After the organization of the Company, subscriptions were procured to its stock for those

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who had been interested with Mr. Shelbourne in his ideas and enterprises, and stock was sold to others when the Company was authorized to do business in October, 1882, and in the Spring of 1883. In 1883 it applied for, was granted, and accepted, its franchise from the City of New York.

6. In its various litigations which are referred to in Mr. Wilson's affidavit submitted herewith, I am the attorney of record and counsel.

7. I have read the said affidavit of Mr. Wilson 302
and the statements therein contained are true. Many thousands of dollars were expended by the Company in preparation for the instalment of its system of suitable conduits and conductors. The Company was repeatedly advised by its then counsel that it was entitled to lay its conduit and trenches in the streets without the consent of the Commissioners of Subways, afterwards called the Board of Electrical Control, but upon application being made to said Board it refused to grant a permit on the ground that it did not have any jurisdiction over this particular Company; and there- 303
upon the proceedings mentioned in Mr. Wilson's affidavit were begun as therein alleged.

8. The application of Daniel L. Gibbens in October, 1886, to the Attorney General, the Hon. Denis O'Brien, being an action to dissolve the Company and to forfeit its charter for non-user was promptly denied by him after argument by the said Gibbons, who was opposed on the argument by the President of the Company, Mr. Shelbourne.

The Company has ever stood ready upon any public demand therefor, to furnish a comprehen-

304 sive system of electrical conductors for telephonic purposes, and is now actively engaged in meeting the present public demand.

9. I am able to state from my own personal knowledge of the Company's affairs from its inception down to the present time, that it has never abandoned its franchises or suspended its business for any period of time whatever.

10. I saw the map which is referred to in Messrs.
305 Wilson and Wood's affidavits submitted herewith, at the time it was filed in May, 1883.

11. I was acquainted with James S. White, now deceased, during the entire period that he was connected with the Company. In the year 1906 he made an affidavit in a proceeding in the Supreme Court of this State entitled "People ex rel. N. Y. Electric Lines Company against William B. Ellison and others, which is on file with that Court. I know the contents thereof and know the allegations therein are true. I annex a copy of that affidavit.
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JESSE LARRABEE.

Sworn to before me this 28th
day of June, 1910.

CHARLES F. NOVOTNY,
Notary Public,
New York County.

Affidavit of James S. White, Referred to in the Affidavit of Jesse Larrabee, Read in Support of Motion.

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State of New York, }
County of New York, } ss.:

James S. White, being duly sworn, says: In the year 1884 and for some time prior and subsequent thereto, I was a resident of the City of New York, doing business at 40 Nassau Street and elsewhere, and I then met Mr. Shelbourne, the President of the New York Electric Lines Company. I first saw him in the year 1884 and we constanly conversed together in respect to his conduit system in which wires were to be placed under ground for telephonic and other purposes. I advanced money from time to time to further the project, subsequently taking stock in the Company in return for said advances. During 1884, Mr. Shelbourne frequently informed me of what he had been doing the two preceding years and was doing in devising and manufacturing at the Company's shops in New York City, various devices, including cables, a carrier to draw the cables and wires through the conduits, designs for lamp-posts which were to serve as the outlet of wires underground and streets, and devices for telephone, including a telephone repeater for long distance use, also coverings for the wires, one in particular being known as the Pepita or some such name, which was designated to keep out heat, cold and acids.

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He also told me that he had procured patents for many of these inventions and that the right to use the said patent rights in the City of New York were all assigned or were to be assigned to the New York Electric Lines Company.

I am not an expert and have forgotten many of

310 *Affidavit of James S. White, Referred to in the Affidavit of Jesse Larrabee.*

the details which were related to me at the time by Mr. Shelbourne. I saw in the Company's office at 11 Gold Street some of the aforesaid devices, including cables and cable carrier.

I also know that during the years of 1883 down to 1886 Mr. Shelbourne made repeated attempts to procure a permit from the public authorities.

After the creation by the Legislature of the Electric Subway Commission he made application to it, and I know of his endeavors both publicly and
311 privately to induce that board to grant a permit.

The only result of his efforts, which included oral argument before them, the filing of maps and other documents, was a refusal on the ground that they did not have any jurisdiction over our Company, to wit, the New York Electric Lines Company and I remember the application that was then made to Mr. Squires and the subsequent litigation up to the decision of the Supreme Court of the United States in 1892.

JAMES S. WHITE.

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Sworn to before me this
11th day of May, 1906.

EMMA DESHON,
Commissioner of Deeds,
(Seal) New York City.

Affidavit of D. A. Reynolds, Read in Support of Motion. 313

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK,

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited). 314

City and County of New York, ss.:

D. A. Reynolds, being duly sworn, says that:

1. I am the President of the Great Eastern Telephone Company, hereinafter referred to as the Great Eastern Company, and have been its President since its incorporation. I am familiar with its business and with all contracts and obligations into which it has entered. 315

I am familiar with the telephone business and have been for twenty years, and have been almost exclusively engaged in it for a period of fourteen years, and I know its history.

2. Until 1895 or 1896 the Bell telephone monopoly controlled patents which expired in these years, and which until then prevented any independent company from operating telephones. Within two or three years thereafter independent companies

began to be operated in small cities, especially in the West, where the use of the switchboards that would accommodate 1,000 telephones or less could be used; but until within a very few years no independent company was able to use the multiple switchboards with all their necessary appliances, for it was not until that time that the expiration of certain switchboard patents controlled by the Bell monopoly allowed the practical operation of such switchboards by others. Thus it was impossible for a comprehensive telephone system to be in-
317 stalled in any city approximately the size of Manhattan without the permission of the Bell telephone monopoly, and that permission could not be obtained.

Some of the original multiple switchboard patents expired about 1901, but others which were essential and necessary to the practical operation of such switchboards continued down to about the year 1905.

3. After careful examination by various able counsel the Great Eastern Telephone Company en-
318 tered into a contract with the New York Electric Lines Company, relying upon the charter of that Company and its franchise to place wires in the streets of New York, and also into contracts with other independent telephone companies who are seeking to have connections in New York City for the purpose of long-distance telephonic communications with all parts of the State and country.

The Great Eastern Telephone Company relying upon the said contract with the New York Electric Lines Company, has made contracts with 107,000 subscribers in New York City, fully 60 per cent. of which are in the Boroughs of Manhattan and

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the Bronx, to supply them with telephones and telephonic connections both local and long distance.

Under these various contracts, obligations have been entered into, some of which are as follows:

(1) The New York Electric Lines Company has obligated itself to furnish telephonic communications and facilities of every kind and nature to all the telephone subscribers which we may provide in the territory covered by its franchise from the City of New York.

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(2) The Great Eastern Telphone Company has agreed to furnish telephones to the said [redacted] subscribers at rates approximately one-half of the rates now charged by the New York Telephone Company, the only telephone company now operating in said territory.

(3) The Great Eastern Company has entered into contracts with other independent companies and has agreed to connect its comprehensive system of telephones in New York City with independent lines which are seeking such connections in and with the City of New York.

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(4) I am satisfied that if the telephone system of the Great Eastern Company was now in operation, long distance connections could be made within six months' time securing to the system and its subscribers, communication with 250,000 telephones in the State of New York alone, with 2,500,000 telephones in the other various states in which independent companies are now being operated, especially the States of New Jersey, Penn-

322 sylvania, Ohio, Indiana, Illinois, Michigan and Missouri.

There is, at the present time, a telephone toll line connection between the various independent systems in Buffalo, Rochester, Syracuse, Binghamton, Albany and south to Poughkeepsie, Newburg and (except for a temporary break in the connection) to Peekskill, and in the various towns and cities in the territory lying between said large cities, which is giving good service to the public through the entire State. Thus the only link re-
323 maining to be built for establishing a complete connection with New York City is the link from Newburg and Peekskill, south to New York City, which as aforesaid, will give an independent long distance toll line connection with 250,000 telephones in the State of New York.

I am informed by those entirely familiar with the independent telephone plants throughout the country and I verily believe that such connection would place more subscribers in toll line connection with each other both in the State of New York and in the other states mentioned as far West as
324 Chicago and Kansas City, that are now in toll line connection with the Bell system, now having connection in the State of New York.

5. From various reports made to the United States Census of 1900, and from other sources, including the papers read at conventions and gatherings of independent telephone companies and published in pubilc journals, I am satisfied that since the basic Bell Patents expired, there have been organized and there are now in successful operation, over 15,000 incorporated independent telephone companies and over 8,000 co-operative asso-

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ciations representing over $400,000,000 of invested capital and employing over 4,000,000 telephones; while according to the published reports of the Bell Company—formerly the Bell monoply—its system now embraces practically 3,300,000 complete instruments, which is 700,000 less than the number of instruments which are being operated, as aforesaid, outside of the Bell system, and at least 2,750,000 and upwards of these independent telephones are located near enough to New York City to be within good, practical talking distance. Not one of these can now obtain connection with 326
the City of New York, because of a well-known contract between the parent Bell Company and each and every one of its operating companies prohibiting connection with any instrument not manufactured or controlled by the parent Bell Company and its allied companies.

6. It is a fact that since the building of independent long distance toll lines, a telephonic connection has been made operative between the City of Buffalo and other cities as far east as Albany, and telephone rate calls through the State 327
of New York, west of Albany, have been greatly reduced. Under the proposed contracts with and between independent telephone companies, subscribers to the New York City system of the Great Eastern Telephone Company will have the right of making toll line connection at rates 40 to 60% less than the long distance rates now charged by the Bell Company, which are lower since competition has intervened, than those exacted heretofore.

7. The Great Eastern Telephone Company has abundant financial backing, and has entered into

328 the telephone field in the City of New York in good faith and with the bona fide intention of being and continuing a competing and independent telephone system in every sense of the word, and in its contracts with other independent companies, there is a specific clause which forbids this company to sell out to, or consolidate with, any of the companies owned or controlled by the Bell system.

D. A. REYNOLDS.

329 Sworn to before me this
30th day of June, 1910.

CHARLES F. NOVOTNY,
Notary Public,
New York County.

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Affidavit of J. Aspinwall Hodge, Read in Support of Motion. 331

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited). 332

City and County of New York, ss.:

J. Aspinwall Hodge, being duly sworn, says that:

1. I am of counsel for the applicant herein and am familiar with the proceedings in which the applicant was a party heretofore had in the courts of this State and in the federal court since the organization of the company in 1882. 333

My knowledge has been obtained as to all matters prior to 1905 from the records of, and the papers filed with, the courts, the briefs of counsel, the records of the Attorney General of this State, the papers and documents of the company and its officers, the papers filed with the United States Patent Office and interviews and consultations with attorneys and counsel who appeared for the company from the time of its organization down to that date.

2. I have read the affidavit of W. W. Wilson submitted herewith and am able to state that all that he states concerning the legal proceedings in which the company was involved prior to 1905 is fully confirmed by the examination I have made of the sources of information above mentioned.

3. Since the year 1905 my knowledge of all legal proceedings in which the company has been a party or has been interested is derived from my personal acquaintance with and participation in every step
335 that has been taken as the attorney and one of the counsel of the company and Mr. Wilson's statement of those proceedings is true and accurate.

4. No application has ever been made for a mandamus to compel the Empire City Subway Company to accord it space in its subways.

5. The Empire Company in March, 1906, filed a brief with the Corporation Counsel in which its counsel sought to sustain the unfounded allegation and contention that the company has forfeited its
336 franchise by non-user.

6. Such a contention raises no issue which can be availed of by the Empire Company as has been decided in the Long Acre case, reported in 188 N. Y., 361.

It is not only unfounded in fact but it is an issue which has twice been raised by applications instigated by the subway and Bell Telephone interests, made to attorney generals of the state and on both occasions, one in 1886 and one in 1906, it was held that there had been no forfeiture of the company's charter or franchise, and the applications were denied after full hearing and argument.

7. The first application was made on October 2, 1886, when one Daniel L. Gibbens filed a petition with the Attorney General, Denis O'Brien, praying that the Attorney General "bring suit to dissolve said company on the ground of non-user," alleging in said petition that the said company had not commenced the business for which it was incorporated and was not ready to commence such business until 1885.

I have had records of the Attorney General's office searched and the information herein con- 338
tained I acquired from said records, copies of which were furnished me by the present Attorney General.

On said application the company was represented by its President, Sidney F. Shelbourne, who filed an affidavit with the Attorney General, which was duly sworn to on the 9th of October, 1886, wherein he states the same facts concerning the active operations of the company prior to 1887 as are stated in the affidavits of Messrs. Wilson, Weed, Warren, Larrabee and White submitted herewith.

8. It further appears that after full argument 339
and a refrence to the various statutes of this state which provide for the forfeiture of the franchises of corporations for non-user, all of which were urged before the Attorney General in said proceeding, the petition of the said Gibbens was denied.

9. Notwithstanding this denial another application was made to the Attorney General on like grounds by one Abraham Sartorius, represented by Edward Lauterbach. A hearing was had on this petition on January 13, 1906, and the entire day

340 was spent in exhaustive arguments upon every phase of the question of non-user; and after Mr. Lauterbach was heard on the part of the petitioner, Charles W. Dayton, representing the Great Eastern Telephone Company; Tracy C. Becker, representing the Inter-Ocean Telegraph and Telephone Company, the Consolidated Telephone Company and other independent companies who are desirous of procuring telephone connections within the City of New York which are denied them by the Bell monopoly; W. M. K. Olcott and J. Aspinwall Hodge,
341 reprehenting the New York Electric Lines Company, were all heard. The City was represented in said proceeding by Hon. William F. Burr, Assistant Corporation Counsel. The petition was denied, and an opinion was delivered which is hereto annexed and marked Exhibit P.

J. ASPINWALL HODGE.

Sworn to before me this
30th day of June, 1910.

CHARLES F. NOVOTNY,
342 Notary Public,
N. Y. Co.

Exhibit P.

343

OPINION OF ATTORNEY GENERAL MAYER RENDERED JANUARY 13, 1906.

This is an application made by Abraham Sartorious to The Attorney General to begin an action on behalf of the People of the State of New York against the New York Electric Lines Company, in substance to destroy the corporate existence of the company named.

In the first place, any citizen has the right to apply to the Attorney-General and, excepting in so far as it may throw light upon the situation, it is not material whether the citizen who applies is really representing himself or representing somebody else. The humblest man may apply to the Attorney-General and should receive from him the same consideration as the most influential man or corporation; while on the other hand, the fact that a petitioner may perhaps really represent a corporation should make his petition none the less earnest for the deliberation of the Attorney-General, for whether the petitioner applies as an individual or as representing a corporation, he is entitled to such consideration as the law may permit, and all stand equal before the law.

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Now, at the outset, I thing it desirable to repeat what the duty of the Attorney-General is in respect to such matters as this for the reason that frequent applications have been made and that the Attorney-General, in the course of his administration, has deemed it necessary to begin some actions in the name of the People of the State. The law provides certain circumstances under which certain kinds of actions may be brought. The law gives creditors and stockholders an opportunity to bring certain kinds of actions against corporations and likewise

346 *Exhibit P, Opinion of Attorney General Mayer.*

gives that power to the People of the State, to be exercised through the Attorney-General. But the final test as to whether the Attorney-General shall begin an action is to be found in Section 1808 of the Code of Civil Procedure, where it is provided that, "Where the Attorney-General has good reason to believe that an action can be maintained in behalf of the People of the State," as prescribed in the articles of the Code mentioned, "he must bring an action accordingly or apply to a competent Court for leave to bring an action, if, in his opinion,
347 that action should be brought." So that ultimately, whether or not an action should be brought rests in the sound discretion and in the honest judgment of the person who happens at the time to be the Attorney-General, and, as was said in the case of People against Ballard, 134 N. Y., that discretion is one which rests with the Attorney-General alone, and for which he is responsible not to the Courts, but solely to the People, and the People must determine whether his conduct in this regard is of a character to justify their approval; so that, as Attorney-General, I am presented with this situation:

348 First.—Is there such a cause of action here; and

Secondly.—Is it my duty, in the exercise of that sound discretion, to begin an action in the name of the People.

Now, this corporation either existed or it did not exist. If it did not exist, no action is affirmatively required by the People of the State to put it out of existence, and the question whether it existed or not, if it be contended that its corporate life has ceased, is a question which, as I held in the New York and Westchester and Portchester application, is a question which may very well be determined in the course of such necessary steps as this corpora-

tion may be compelled to take in order to carry into active effect the purposes of its corporate life; so that I eliminate at the outset any consideration of the question that an examination of the facts should show that the corporation has ceased to live; for, if it has ceased, then I have nothing to do with it, and I have no duty to assert the power of the People of the State in reference to it. I must, then, assume that, for the purpose of the argument, without expressing an opinion, the corporation itself existed, and now I am asked to begin an action to destroy its existence. 350

It seems to me that the corporation has at least attempted to preserve its corporate existence. While I am not familiar with the details of the history of the time—nor is it important that I should be—it is apparent from the record that the Board of Electrical Control did not grant a permit to this corporation, and that the corporation thereupon applied to the Courts, which was proper for it in its purposes and desire to exact from another public officer, the permit which was denied by the Board of Electrical Control. Whether that was the proper method to pursue is not material. 351 Whether the corporation should have gone back to the Board instead of going to the Courts is not material, for clearly it acted under advice, and as it saw the situation then; it made, as it seems to me, a fair effort to obtain what it believed at that time it was entitled to.

Now, the persons interested in this company also have made something of an effort to preserve its corporate life since then. Whether they have succeeded or not is not for me to determine. It is enough that I should feel satisfied that such an effort was made; that, if the Courts were to say

that this corporate life was still in existence, such conclusion would not be against the public interest.

That brings me then to the situation as to what advantages this corporation claims now, as against the time when, had things gone well with it, it originally could have exercised its corporate business. So far as the taxes of the State are concerned, it will not escape either the franchise tax, if it be alive, which is the tax upon the right to live, and determined by the provisions of the General Tax Law, nor will it escape the special franchise tax;
353 and it will be compelled to pay, by way of taxes upon the assessment which shall be an assessment of the true value of these franchises, as they may appear from time to time to the taxing officers, while, in the situation in which it has been thus far, its taxes may have been moderate or even exceedingly small because its rights and privileges were not of any substantial market value, yet if it should be permitted to exercise its corporate life, both the State Comptroller as the taxing officer upon one branch, and the State Board of Tax Commissioners upon another branch, will have before
354 them, under oath, the true value of these franchises; and so the State will lose nothing.

In regard to the City, there is no application here before me from the City authorities. There has been no expression to me from the corporate body known as the City of New York, claiming or urging that any damage or injustice will be done to the City of New York unless an action to dissolve this corporation be begun. The duty, initially, of protecting the City is with the authorities of the City, and in the absence of corruption or public scandal, the Attorney-General at all times would be loath to interfere with the policies of the

local administration of a city, town or village, unless, at the instance of the local authorities. 355

There will be plenty of opportunity for the City to assert such policy and such rights as they deem proper, and the assertion of these rights is clearly a matter for the City in relation to such matters as refer entirely to the City; and in the absence of an application from the City the responsibility in that regard must be placed upon the City authorities, where it fairly belongs, and not upon the Attorney-General of the State, who represents the People of the State from one end to the other. 356

Now, on the question of competition and of the rights of the company which has heretofore given the City the telephone service, and which, as eloquent counsel for the petitioner has stated, has built connections and done all the things to give the City a telephone service, on the question of competition, it seems to me that the situation is something like this: I have nothing to do with the question of whether the competition, if such takes place, of this independent company is just or unjust, as against the existing company. This is a matter for those companies to battle out between themselves. 357 That is a matter of business that is no affair of mine. When the New York Telephone Company, if that be the name of it, undertook the great enterprise that it has made so successful, it undertook it with the knowledge that, at a certain period of time, its patents would expire, and it undertook that enterprise as all business people do, not for the purpose of altruistic good, but in order to make money; and that is a perfectly proper thing; and, as a result of making money, great enterprises have been of great benefit to the people, and I am not to be understood as having anything less than a very substantial appreciation of the

358 great enterprise which, while they may have made money for themselves, have benefited the people. But when the New York Telephone Company acquired its great rights here, it knew that some day, at a definite day, I should say, its patent rights would expire and it made its investments and did its business upon the faith of that; so that the sole question that I must determine is not the relations between these two companies as business rivals, but the public interest. Now, on the one side is the possibility that the City of New York,
359 if this were a new corporation and a new application, would exact from the applicant a much larger price for the franchise of doing business under its streets than it is permitted to exact under the terms of the grant of the Board of Aldermen which is relied on by this New York Electric Lines Company. The grant of the Board of Aldermen is a contract with the New York Electric Lines Company. That is elementary. Whether that can be forfeited or not, I am not prepared to say; assuming the company to be dead; I am not prepared to assent to the proposition of Mr. Hodge in the regard, but
360 that is neither here or there. The terms of the contract entered into by the City was regarded at the time as a proper contract by the City authorities. Now, if nothing had been done by this company, and if this were an effort to revive a valuable franchise, where nothing whatever had been done and merely to revive a franchise, to hawk it around for what it is worth, a different situation might be presented; but it is clear to me that enough effort has been made to at least make the question a matter of doubt; and enough effort has been made by this company to entitle it to make a fair argument that it is legally in existence at any place or

time when it is called upon, and I held in the Westchester and Portchester case that when a company was in a situation to make a fair argument, an honest argument, and an argument that might be subject to genuine debate, that it was no business of the Attorney-General to begin proceedings to annihilate the corporate life of such a company.

Now, on the question of the public interest, on the other hand, lies the fact, well known, that the People of the City of New York and of the State desire every public service that they can get, cheaper. An honest competition is of course well known 362
to be a means toward that end; so that it narrows down to this: On the one hand is the possibility that if this company is put out of existence that any new company might get a franchise which, for the time being, might mean more money in the treasury of the City of New York, and on the other hand is a clear demand not necessary to prove before me by affidavits, but so well known that I might almost, if I can say so, take judicial notice of the fact, a clear demand by the people of the City and the State that there should be a fair competition which shall result in a fair reduction 363
of the prices that they are paying in regard to this necessary and most important public service; and so I decide that there are no public interests which require that I should interfere. I conclude that the matter of the existence of this company and all other questions are essentially for the City itself to determine, and not for me; that the People of the State have no such interest which commands me, as such officer, to bring an action to annihilate the corporation.

And for all the reasons stated I deny the application.

JULIUS M. MAYER,
Attorney-General.

Affidavit of R. W. Hollaman, Read in Support of Motion.

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

In the Matter
of
The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

State of New York, }
County of New York, } ss.:

R. W. Hollaman, being duly sworn, says: that he is an attorney associated with J. Aspinwall Hodge the attorney for the New York Electric Lines Company herein; that on the 24th day of June, 1910, at 6:15 P. M. he served a letter, a copy of which is annexed to Mr. Wilson's affidavit and marked Exhibit J, and the enclosures therein referred to upon the Empire City Subway Company, Limited, herein by depositing it in a post office box at the corner of Wall Street and Broadway, Borough of Manhattan, City of New York, the same being one of the regular boxes of the New York City Post Office, enclosed in a securely closed postpaid wrapper addressed to said Empire City Subway Company, Limited, No. 18 Cortlandt Street, Borough of Manhattan, City of New York.

R. W. HOLLAMAN.

Sworn to before me this
1st day of July, 1910.

CHARLES F. NOVOTNY,
Notary Public,
N. Y. County.

VOL. I. 367

Affidavit of John H. Cahill, Read in Opposition to Motion.

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

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The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

County of New York, ss.:

John H. Cahill, being duly sworn, says:

I am Vice-President, General Counsel, Secretary and a director of the Empire City Subway Company (Limited). I have been an officer of this company since 1891, which was the year when it began to do business. I was an officer of the Metropolitan Telephone and Telegraph Company, beginning by relations therewith in May, 1880, the month in which it was incorporated, and continuing with it without interruption until it was succeeded by the New York Telephone Company in the year 1896. I was one of the original incorporators of said New York Telephone Company, having signed its certificate of incorporation on or about the 12th day of June, 1896, and have been con-

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nected with it continuously since its incorporation, as a director and officer, being now its Vice-President and General Counsel.

During the said last thirty years I have been and am now entirely familiar with what has taken place in the City of New York in the telephone and subway conduit business.

I knew Sidney F. Shelbourne, who was President of the New York Electric Lines Company, well during his lifetime. I often met him in attendance before public boards and bodies and elsewhere, and
371 discussed with him what he expected to do, himself, and what he expected his company to do. His purpose as expressed to me and before the public bodies was to obtain for his company the right to construct a general underground subway conduit system in the City of New York, the contract for which was subsequently awarded to the Consolidated Telegraph and Electrical Subway Company, and in turn the low tension subways to the Empire City Subway Company (Limited). Said Shelbourne often spoke of improvements which he was making and expecting to make with respect to in-
372 stallation and kindred matters in connection with electrical subways, but he never spoke of a telegraphic or telephonic business except to disclaim his intention and the intention of his company to enter into the telegraphic and telephonic business, and to devote his and its entire energies to the construction or leasing of subway conduits.

Annexed to the affidavit of Wayne W. Wilson in support of the pending application, marked Exhibit B, is the certificate of incorporation of the New York Electric Lines Company, the relator, and annexed thereto, marked Exhibit C, is a paper which purports to be an amended certificate of in-

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corporation of the New York Electric Lines Company, the relator, but the said company was not at the time of the commencement of this proceeding an existing corporation under the law of this State. The said company did not commence the transaction of its business within one year from the date of its incorporation. By reason of its failure to commence the transaction of its business within one year from the date of its incorporation, the corporate powers of said company ceased long prior to the commencement of this proceeding.

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The relator New York Electric Lines Company has not lawful power to operate telegraph or telephone conductors in the streets, avenues or highways, or in any street, avenue or highway, in the Borough of Manhattan, nor has it lawful power to operate telegraph or telephone conductors in the streets, avenues or highways, or in any street, avenue or highway, in any other portion of the present City of New York. The said New York Electric Lines Company, the relator, is not an authorized company intending to operate and use electrical conductors in certain of said streets, nor is it an authorized company intending to operate and use electrical conductors in certain of said streets.

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The New York Electric Lines Company was not at the time of the passage of the act of the Legislature in the year 1892, Chapter 263, or at any other time, a corporation which was recognized as existing and doing business.

The said paper which purports to be an amended certificate of the New York Electric Lines Company, the relator, annexed to the moving papers, marked Exhibit C, was made and filed in the year 1907, long after the date of the relator's alleged

376 franchise and the revocation thereof, by the City of New York as hereinafter set forth.

Annexed to the moving affidavit of Wayne W. Wilson, marked Exhibit D, is a copy of the record of certain proceedings of the Board of Aldermen, which is the alleged franchise of the relator set forth in the moving papers. The said proceedings of the Board of Aldermen did not and do not constitute a franchise granted by the Board of Aldermen of the City of New York to the New York Electric Lines Company and did not and do not
377 constitute a contract between said company and the City of New York.

Annexed to the moving affidavit of Wayne W. Wilson is a copy of the record of certain proceedings of the Board of Aldermen of the City of New York, marked Exhibit E, purporting to be an acceptance of the alleged franchise by the New York Electric Lines Company, but such alleged acceptance was in words only and was not an acceptance in fact or in law and was not accompanied or followed by any act or deed of the said company to effectuate such acceptance, and the said
378 alleged franchise was never acted on by said company, nor any work done or moneys expended in pursuance thereof, but on the contrary there was a non-user of said alleged franchise and an abandonment of the same from the time it was passed by the Board of Aldermen, April 10th, 1883, until on or about the 11th day of May, 1906, when the same was revoked and terminated by the legislative authority of the City of New York, to wit, the Board of Estimate and Apportionment, in a resolution in the following words:

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"WHEREAS, The New York Electric Lines Company, under a resolution of the Board of Aldermen, passed April 10, 1883, claims to have received permission to open the streets of the city and construct subways in which to place wires for telegraphic and telephonic communication and for electric illumination, and by reason thereof claims a perpetual franchise in the streets of the city; and

"Whereas, The said company has failed and neglected to construct such subways and lay said wires for over twenty-three years, and 380
now seeks leave to open the streets, and construct subways and lay wires therein for the use of the Great Eastern Telephone Company, under its said alleged perpetual franchise therein; and

"Whereas, If said Company has not lost its corporate existence and all its charter rights and privileges, by reason of its failure to satisfy and comply with the terms of the statutory enactments applicable thereto, in the opinion of this Board, it has long since forfeited by reason of non-user all rights and 381
privileges it may have secured under the permission granted by said resolution of the Board of Aldermen on April 10, 1883; it is therefore

"RESOLVED, That any and all rights or privileges to the use of the streets, if any such rights or privileges still exist, acquired by said New York Electric Lines Company under the permission granted said company by the said resolution of the Board of Aldermen passed April 10, 1883, be and hereby are revoked and terminated; and the resolution of the Board of

Aldermen adopted on such date is hereby in all respects repealed and revoked,"

a certified copy of which is hereto annexed marked Exhibit A.

The statement contained in the affidavit of Wayne W. Wilson, forming part of the moving papers, that the alleged franchise of the New York Electric Lines Company, the relator, have never been called in question by the City of New York
383 except as thereinafter set forth, is not true. Just prior to the 11th day of May, 1906, the said company made formal application to the Commissioner of Water Supply, Gas and Electricity for permits to open certain streets in the Boroughs of Manhattan and the Bronx for the purpose of laying conduits therein, and on said 11th day of May, 1906, said Commissioner refused such permits in a formal determination as follows:

"The permit applied for by the New York Electric Lines Company is refused for the reasons stated in the opinion of the Corporation
384 Counsel, to wit:

"'The New York Electric Lines Company has no valid franchise or rights in the streets of the City, nor has it a legal corporate existence.'"

There never has been a time when the alleged franchises of the New York Electric Lines Company have not been questioned by the City of New York from the time of its first application to open the streets of said city.

The statement contained in the affidavit of Jesse

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Larrabee, forming a part of the moving papers, that

> "I am able to state from my own personal knowledge of the company's affairs from its inception down to the present time, that it has never abandoned its franchises or suspended its business for any period of time whatever,"

is not true. The fact is that it abandoned its so-called franchises from the moment they were granted and endeavored to engage in a business not 386
warranted by law, to wit, the installation of a system of conduits under the streets of the City of New York. It made no attempt to do business from the time of the first official denial of a permit to construct such a system of conduits and spent all of its energies in fruitless litigations in an endeavor to obtain a right to build such system of conduits.

The allegations contained in the moving affidavits that

> "The company has ever stood ready, upon any public demand therefor, to furnish a comprehensive system of electrical conductors for telephonic purposes and is now actively engaged in meeting present public demands," 387

is not true. The only thing that the New York Electric Lines Company ever attempted to furnish were conduits for electrical conductors, and not electrical conductors themselves for telephonic purposes. The New York Electric Lines Company was not at the time of the commencement of this proceeding engaged in any business, but had turned all

of its business and property over to the Great Eastern Telephone Company.

It was expressly provided by the ordinance of the Board of Aldermen of April 10, 1883, being the so-called franchise of the relator, that the permission "is conditioned that the said company shall not transfer or dispose of the franchise hereby granted without the further authority of the Common Council, and that it will make no discrimination of individuals or corporations in the rental and use of its lines or wires which may be laid
389 down hereunder."

The New York Electric Lines Company is not the real party in interest in this proceeding.

It is not true that the New York Electric Lines Company has not transferred any of its franchises to any other company or individual. All of the rights, franchises and property of the New York Electric Lines Company were transferred and disposed of by the relator to the Great Eastern Telephone Company, a corporation organized under the laws of South Dakota, known as a "holding or pioneer company," long prior to the commencement
390 of this proceeding, and at the time of the commencement of this proceeding the said Great Eastern Telephone Company of South Dakota was and now is the sole owner of all the franchise rights and property of said New York Electric Lines Company, the relator, subject to a so-called "perpetual lease of telephone rights" which said Great Eastern Telephone Company of South Dakota had prior to the commencement of this proceeding executed to the Great Eastern Telephone Company organized under the laws of the State of New York, known as an "operating company" and which latter company is intended to develop "telephone rights" only.

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By the transfers and dispositions aforesaid the said New York Electric Lines Company divested itself of all of its rights, property and franchises, and the transferee, the South Dakota Company, has attempted to split up or subdivide said franchises so as to transfer only so much of said franchises as relate to the so-called "telephone rights" to the New York corporation of the same name, retaining or attempting to retain so much of said franchises as relate to the telegraphic and electric illuminating businesses, which it claims, for itself.

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If such transactions shall be held to be lawful, the result will be that under one permission or franchise several corporations will be conducting several businesses and systems under the streets of the city.

The New York Electric Lines Company, as appears from the facts above stated, has now done, or attempted to do, and hopes to do, the very thing which they officially declared, in 1886, they were not to do, as is shown by the following extract from an official communication signed by Sidney F. Shelbourne, president of the New York Electric Lines Company, and filed in the office of the Commissioners of Electrical Subways, New York City, under date of January 25, 1886:

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> "Gentlemen:—The directors of the New York Electric Lines Company have lately noticed in the public press the currency of rumor of an impending monopoly and of surreptitious actions and combinations to that end in the promotion of an underground electrical system for this city, which, while not specifically directed towards this company, as was the case earlier in the progress of your

investigations, affect (however false and unfounded they may be) alike the merits of all the systems or plans before your Board, in that such newspaper articles are calculated to shake the public confidence in the merits of whatever plan your Board may adopt.

"It has not until now been thought advisable to answer such current attacks, so far as this company is concerned, by the statement that from the time of its incorporation in October, 1882, its single aim and pursuit have been to
395 furnish such an underground system, entirely of its own ownership, and to provide every possible safeguard against falling into the hands or control of any one of the existing companies or becoming subject to the power of any combination whatever.

"With such objects in view, very early in its corporate history, to wit, in April, 1883, when its franchise was obtained from the Common Council, it was provided in that franchise that the very existence of the company's business in this city should depend on its integrity
396 and good faith to the public in not bartering away its franchise and in making no discrimination of individuals or companies, in the common use of its lines of wires or in the fair and equal facilities provided for all interests, present and future."

This proceeding is not brought in good faith.

This proceeding is not brought for the purpose stated in the moving affidavits, but for the purpose on the part of the Great Eastern Telephone Company in the name of the relator, the New York Electric Lines Company, to obtain the right and

opportunity of and for the Great Eastern Telephone Company to lay its wires under the streets of the City of New York, and not for the purpose on the part of the New York Electric Lines Company to lay its own wires or conductors under said streets. The said Great Eastern Telephone Company is not a corporation authorized to carry on a telegraphic or telephonic business in the City of New York or to lay its conductors under the streets of the City of New York.

The power or right which the relator claims to "lease" conductors for telegraphic and telephonic 398
communications, while set forth in its certificate of incorporation, was not provided for in the statute under which the relator was incorporated, as is pointed out in the opinion of Judge Chase on the appeal of the relator on the former proceedings, 188 N. Y., page 523, at page 529.

The New York Electric Lines Company, the relator, is not a company or corporation having lawful power to operate telegraph or telephone conductors in any street, avenue or highway in the City of New York.

By the terms of the contract between the City 399
of New York and the Empire City Subway Company (Limited) set forth in the moving papers and annexed thereto, marked Exhibit A, it is provided:

> "IV. The spaces in said subways, conduits and ducts shall be leased by the party of the second part to any company or corporation having lawful power to operate telegraph or telephone conductors in any street, avenue or highways in the City of New York, or to the Edison Electric Illuminating Company of New York, its successors or assigns, if it or they shall apply for the same."

400 The Empire City Subway Company (Limited) is, therefore, not authorized or required to assign or lease any spaces in its subways, conduits or ducts to the New York Electric Lines Company, the relator, nor is the New York Electric Lines Company authorized to occupy or lease the same.

The space applied for in the subways, as indicated in Exhibit H, annexed to Wayne W. Wilson's affidavit in the moving papers, is not an essential part of the comprehensive or other plan of the New York Electric Lines Company, the relator, and is not imperatively needed by said company at once, as alleged in the said affidavit. The space applied for, as indicated in Exhibit H, is not applied for for the use or benefit of the New York Electric Lines Company, but for the use and benefit of said Great Eastern Telephone Company of South Dakota, a foreign corporation, which has no right or authority to transact business in the State of New York or to conduct telegraphic or telephonic business or any other business within the State of New York. The said space applied for is applied for in the interest and behalf of the said Great Eastern Telephone Company.

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402 The New York Electric Lines Company did not at the time of the commencement of this proceeding conduct or carry on and has never conducted or carried on a telegraphic or telephonic business.

The New York Electric Lines Company has repeatedly, by its acts and declarations, disclaimed any intention to operate electrical conductors for telephonic or other purposes, and has thereby abandoned any right which it may have had under its articles of incorporation, or the resolution of the Board of Aldermen of April 10, 1883, to itself operate electrical conductors for any purpose whatever.

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Among such acts and declarations are the following:

(1) In the verified petition of said company to the Court of Common Pleas for a writ of mandamus against Rollin M. Squire, as Commissioner of Public Works, dated August 25th, 1886, it was stated that "your petitioner has never operated or intended to operate electrical conductors, its intention having always been and still being, to lease to other persons, natural or corporate, all of its electrical conductors, and not to operate itself any of such conductors, or any other electrical conductors."

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(2) In the complaint of said company in an action brought by it against John D. Crimmins, the Board of Electrical Subway Commissioners and others in the Supreme Court of the City of New York, in 1886, which complaint was verified September 27th, 1886, it was again stated that "this plaintiff has never operated nor intended to operate electrical conductors, its intention having always been and still being to lease to other persons, natural or corporate, all of its electrical conductors, and not to operate itself any of such conductors, or any other electrical conductors."

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(3) In the affidavit of Sidney F. Shelbourne, president of said company, sworn to October 9th, 1886, and filed in opposition to an application made to the Attorney-General on or about said date on the petition of Daniel L. Gibbens, it appears that the intention and purpose of said Company was to furnish "a general system for all other companies in New York City, not only of conduits, but also a perfected and harmonious system of electrical conductors, ready for use, with the greatest convenience to the companies in said city using elec-

tricity. That said company is a private corporation not clothed with a public interest, or amenable to the people at large by reason of any corporate functions in which the people of the State have any concern, duty or relation. That said company has never intended to serve the public at large as common carriers in sending and receiving telegraphic messages."

The New York Electric Lines Company during the sixteen years that elapsed from the making of the contract between the City of New York and
407 the Empire City Subway Company (Limited) in 1891 and the year 1907 never applied to said last mentioned company for space in its conduits or subways, nor did it ever apply to the Consolidated Telegraph and Electrical Subway Company, which prior to the said contract of 1891 with the Empire Company constructed, maintained and leased the subways for both high and low tension conductors.

From the date of the application of the relator, dated June 17, 1907, Exhibit K (and the correspondence incidental thereto, Exhibits L, M and N), no further or other application was made by
408 the relator or by anyone in his behalf for space in the conduits of the Empire City Subway Company, until the application dated June 7th, 1910, annexed to the moving papers marked Exhibit H.

The five thousand dollars United States currency referred to in the moving affidavits as having been produced and offered to Ford Huntington, treasurer of the Empire City Subway Company (Limited) on the 7th day of June, 1910, by Wayne W. Wilson, as set forth in said Wilson's affidavit, was not the money of the said New York Electric Lines Company, nor had the said New York Electric Lines Company any title thereto or interest

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therein, being at that time wholly without funds, property or business. The facts more fully appear in the affidavits submitted herewith. The said New York Electric Lines Company at the time of making said alleged tender was not able to and did not intend to keep such alleged tender good nor to deposit the same with the Empire Company at any time.

The New York Electric Lines Company was not at the time of the commencement of this proceeding, and was not at the time of making said demand, and is not ready, willng and able to give 410
the bond referred to in the application annexed to the moving affidavit of Wayne W. Wilson, marked Exhibit H, as alleged in said affidavit, and is not ready, willing and able to give any bond, having no funds, property or business. The facts more fully appear from the annexed affidavits submitted herewith.

The New York Electric Lines Company, the relator, has not maintained an executive office force, a corps of engineers and draftsmen, who have been constantly engaged in devising a comprehensive system of wires to supply telephone users in the 411
City of New York with needed wires, as alleged in the moving papers. Whatever has been done in that direction has been done by the Great Eastern Telephone Company, a corporation organized under the laws of South Dakota.

The maps referred to in the moving papers as Exhibit O and which purport to show the so-called comprehensive plan for telephone connections in the City of New York, are not maps or plans for telegraphic or telephonic purposes, but are maps and plans for conduit purposes, and they are not maps and plans prepared by the New York Elec-

tric Lines Company, the relator, but by the Great Eastern Telephone Company, prepared by or under the direction of the latter company.

The statement contained in the moving affidavit of D. A. Reynolds, that

> "7. The Great Eastern Telephone Company has abundant financial backing, and has entered into the telephone field in the City of New York in good faith and with the bona fide intention of being and continuing a competing
> 413 and independent telephone system in every sense of the word,"

is not true.

The Empire City Subway Company (Limited) has unoccupied about one-half of the space demanded by the relator, and could within a reasonable time furnish the balance of space in its conduits substantially sufficient to accord the particular space set forth in the application of the New York Electric Lines Company, the relator, if the same be engineeringly practicable, and were the
414 said New York Electric Lines Company, the relator, a corporation having lawful power to operate telegraph or telephone conductors in any street of the city, as specified in the statute and the contract between the City of New York and the Empire City Subway Company (Limited) annexed to the moving papers, but if the New York Electric Lines Company or the corporations allied with it were to carry out the so-called "comprehensive" plans set forth in the moving papers it would be necessary to duplicate the present system of subways through such portions of the city as are engineeringly practicable, at a cost of millions of dollars (estimated

in the circular, herewith submitted, issued by D. A. Reynolds, who is president of the relator, as well as the president of the Great Eastern Telephone Company, at fifteen million dollars), which would eventually have to be borne by the City of New York if the City hereafter takes over the conduits as its own under the provisions of its contract with the Empire City Subway Company (Limited). The Empire City Subway Company (Limited) would be forced to expend millions of dollars for the benefit of the prospective tenant which, as appears from the affidavits herewith submitted, is financially irresponsible and utterly unable to pay the very large aggregate rentals which the building and maintenance of such a new system would entail, and for which under the terms of the contract with the City the Empire City Subway Company (Limited) is restricted to a limited return on the investment. The fact that such a financially irresponsible tenant is required to give a limited bond as prescribed by Chapter 263 of Laws of 1892, to secure the payment of rentals for a term of five years only, would be little security to the Empire City Subway Company (Limited), for the reason that upon the expiration of the bond the conduits would be tenantless.

The Act, Chapter 263 of 1892, contains a provision that no permit to open the streets for *underground construction* shall be granted unless "there is an existing demand for the construction of such conduits or subways; nor unless the occupation of said conduits or subways is reasonably assured, and the public interests require the construction thereof."

There was not at the time of the demand of the relator hereinbefore referred to, nor at the time

of the commencement of this proceeding, nor is there now, existing demand for the construction of such conduits or subways as have been applied for by the relator, nor was nor is the occupation of said conduits or subways reasonably assured, nor do the public interests require the construction thereof.

In the contract between the Empire City Subway Company (Limited) and the Board of Electrical Control, dated May 15, 1891, it is provided that if the net annual profits of the company after
419 the payment of the reasonable and necessary expenses of maintaining and operating its subways, conduits and ducts, shall exceed ten per cent. upon the actual cash capital invested by it in providing, constructing and equipping such subways, conduits and ducts, then the excess of such profits over ten per cent. shall be paid into the treasury of the City of New York for the benefit of said city, and also that the city shall have the right to acquire the said subways, conduits and ducts from said company at any time after January 1st, 1897, upon payment of the actual cost thereof, and any de-
420 ficiency in annual earnings not exceeding ten per cent. on such cost.

The interest of the city is a substantial financial interest which cannot be disregarded.

Furthermore, as to the financial interests of the city:

By the terms of the Greater New York Charter which has gone into effect since the alleged permission or franchise was granted to the New York Electric Lines Company by the Board of Aldermen, and while the New York Electric Lines Company has been sleeping on its alleged rights, it has been declared that the rights of said municipality

to the use of its streets are inalienable, and that every grant of or relating to a franchise of any character must be by ordinance and for a period of not longer then twenty-five years; and by Chapter 466 of 1901 and acts amendatory thereof and supplemental thereto, by ordinance or by resolution of the Board of Estimate and Apportionment, and with the further approval of the Mayor of the City of New York.

For such a franchise as the relator claims, to wit, a franchise to do a general telephone business in the streets of the City of New York, the Atlantic 422
Telephone Company has, since the enactment of the Greater New York Charter, as I am informed and verily believe, offered to pay to the City of New York a total minimum amount of two million seven hundred and eighty thousand ($2,780,000) dollars for a twenty-five years' franchise, and an application therefor upon such terms is now pending before the Board of Estimate and Apportionment of the City of New York. The sources of my information and the grounds of my belief are a petition verified by John H. O'Brien as Commissioner of Water Supply, Gas and Electricity of the 423
City of New York, verified on or about the 6th day of July, 1909, and now on file in the office of the Clerk of this Court in an application made by the City of New York for leave to intervene in a proceeding then pending in this Court, entitled "People of the State of New York ex rel. Public Service Telephone Company against Empire City Subway Company (Limited), and the further sources of my information and the grounds of my belief are the proceedings of the Board of Estimate and Apportionment.

An application is also pending, as I am informed

and verily believe, before the said Board of Estimate and Apportionment for a similar franchise in behalf of the Independent Telephone Company of New York. The sources of my information and the grounds of my belief in that respect are the same as last above stated.

The application should be denied because of the laches of the relator and because of the Statute of Limitations, viz.:

It appears by the moving papers that the New York Electric Lines Company, the relator, was in-
425 corporated on or about October 14, 1882, and that on or about April 10, 1883, the Board of Aldermen of the City of New York gave the New York Electric Lines Company, the relator, permission to lay electrical conductors under the streets of the City of New York. That the New York Electric Lines Company, the relator, had never prior to July 1st, 1910, the date of the commencement of this proceeding, which is predicated solely upon a demand made on the Empire City Subway Company (Limited) on the 18th day of June, 1910, endeavored to compel by mandamus the Empire City Subway
426 Company (Limited) or the Consolidated Telegraph and Electrical Subway Company, hereinafter mentioned, to allow it to place electrical conductors in the ducts of either of said subway companies, nor taken any proceedings to enforce its alleged right to place electrical conductors in the ducts of either of said subway companies. After the passage of the subway acts, so-called, in 1884 and 1885, the City of New York, on or about the 22nd day of July, 1886, and on or about the 7th day of April, 1887, entered into certain contracts with the Consolidated Telegraph and Electrical Subway Company for the building of subways for electrical

conductors in the City of New York in which were to be placed all high and low tension electrical conductors, which contracts were ratified and confirmed by the Legislature of the State of New York by the act of June 25, 1887. Thereupon and thereafter it became unlawful to place electrical conductors under the streets of the City of New York except in the ducts of said Consolidated Telegraph and Electrical Subway Company until the making of the contract hereinafter mentioned with the Empire City Subway Company (Limited), and any corporation having a right to lay electrical conductors under the streets of the City of New York had, after the passage of said laws and the making of the said contracts with said Consolidated Telegraph and Electrical Subway Company, the right to apply for and compel the said subway company to permit such corporation to lay such conductors in its ducts. On or about May 15, 1891, the Empire City Subway Company (Limited) entered into a contract with the City of New York by virtue of which and of the laws relating thereto and the conveyances executed to carry out the same, the Consolidated Telegraph and Electrical Subway Company conveyed to the Empire City Subway Company (Limited) all the subways, conduits and ducts for telephone and telegraph conductors which it had constructed in said city, and also the subways, conduits and ducts for electric light and power conductors constructed by it for the use of the Edison Electric Illuminating Company of New York, and the Empire City Subway Company (Limited) agreed to provide, build, equip, maintain and operate, as therein provided subways, conduits and ducts for telegraph and telephone conductors and for low tension electric light and power

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430 conductors of the Edison Electric Illuminating Company of New York and thereafter such conductors were required to be maintained and placed in the ducts of the Empire City Subway Company (Limited). Thereupon and thereafter it became unlawful to place telephone and telegraph conductors under the streets of the City of New York, except in the ducts of the Empire City Subway Company (Limited), and any corporation having a right to lay telephone and telegraph conductors under the streets of the City of New York had,
431 after the making of said contract with said Empire City Subway Company (Limited), the right to apply for and compel the said Subway Company to permit such corporation to lay such conductors in its ducts. On or about January 17, 1888, the Court of Appeals of the State of New York decided that the relator had no right to build conduits or ducts under the streets of the City of New York for electrical conductors, and that decision was affirmed by the Supreme Court of the United States on or about May 2, 1892. The New York Electric Lines Company, the relator, never applied to the Consoli-
432 dated Telegraph and Electrical Subway Company for space in its conduits or subways. On or about June 7, 1907, and not till then, the New York Electric Lines Company applied to the Empire City Subway Company (Limited) for space in its ducts, but subsequently abandoned such application and no proceedings were taken by the relator by writ of mandamus or otherwise to compel the assignment to it of space in the ducts of said Empire City Subway Company (Limited) or its admission to the use thereof, until the commencement of this proceeding. No demand was ever made upon either of said subway companies hereinbefore mentioned,

except the demand made on or about the 7th day of June, 1907, and the demand made on or about the 18th day of June, 1910. If the relator ever had any right to place its wires in the ducts of either of said subway companies hereinbefore mentioned, it has slept on its rights and lost the same by laches and delay. The right, claim or cause of the New York Electric Lines Company, the relator, stated in its moving papers herein, accrued more than twenty years before the commencement of this proceeding, and said right, claim or cause is barred by the Statute of Limitations; the right ,claim or cause of the New York Electric Company, the relator, stated in its moving papers, accrued more than ten years before the commencement of this proceeding, and is barred by the Statute of Limitations; the right, claim or cause of the New York Electric Lines Company, the relator, stated in its moving papers accrued more than six years before the commencement of this proceeding, and is barred by the Statute of Limitations; the right, claim or cause of the New York Electric Lines Company, the relator, stated in its moving papers, accrued more than three years before the commencement of this proceeding, and is barred by the Statute of Limitations; the right, claim or cause of the New York Electric Lines Company, the relator, stated in its moving papers, accrued more than four months before the commencement of this proceeding, and is barred by the Statute of Limitations.

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The statements contained in the moving affidavit of Wayne W. Wilson, forming part of the moving papers, that

> "The notices and receipts held by me and on file wtih the company show that the company's

special franchise tax has been each year valued by the State authorities and has been duly paid by the company and collected and accepted by the State authorities, and this has been done both before and after the passage of the resolution of the Board of Estimate and Apportionment of May 11, 1906, hereinbefore referred to"

are not true

The New York Electric Lines Company has not
437 been assessed for franchise tax and has paid no franchise taxes for the years 1909 and 1910, nor has the company's so-called special franchise been valued by the State authorities for the years 1909 and 1910.

The facts with reference to the assessment or attempted assessment of the franchises and personal property of the New York Electric Lines Company more fully appear in the affidavits herewith submitted. The Empire City Subway Company (Limited) has been unable to obatin full information with respect to the taxes assessed against the
438 New York Electric Lines Company, although it has requested the same, and is unable to meet in detail all the allegations in the moving papers with respect thereto, for the reason that the Department of Taxes and Assessments of the County of New York have declined to allow more than a limited examination of their records or to allow physical copies of their records with respect to said New York Electric Lines Company to be taken, and the Empire City Subway Company has no means of compelling an examination of said records in time for the hearing of this application or the production of the same on this application.

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If the subject of the assessment of the so-called special franchises or the personal property of the New York Electric Lines Company be deemed by the Court material to this proceeding, further than as above set forth, the Empire City Subway Company (Limited) asks that an appropriate order be made by the Court on this application to provide for a further inspection of said records and the taking of proof of their contents to be used in this proceeding.

In a report made by the New York Electric Lines Company to the State Board of Tax Commissioners for the year 1899, verified by George L. Weed as Secretary and Treasurer on the 30th day of October, 1899, it is stated as follows: 440

> "The Company has patents of the U. S. almost expired now for which the capital stock was issued but these patents cannot be used as the authorities refuse to give us permission to open the streets or use our franchise and our rights are still pending in the Courts."

So it appears that the capital stock of the company was issued for patents that were never used and that have now expired. 441

In the last mentioned report said New York Electric Lines Company also reported as follows:

> "Capital Stock—Market Value During Year, Highest ½ cent a share. Lowest ½ cent a share."

In the annual report filed by the New York Electric Lines Company in the office of the Clerk of the County of New York on the 18th day of January, 1901, the following statement appears:

442 *Affidavit of John H. Cahill.*

> "*The existing assets of said corporation amount to at least the sum of*
> The value thereof is undetermined by reason of the fact that they consist of a certain franchise which the said company has as yet been unable to use, and certain patents in same condition."

In the annual report filed by the New York Electric Lines Company in the office of the Clerk of the County of New York on the 20th day of January,
443 1902, it is stated that

> "*The amount of its assets at least equals the sum of* twenty-five hundred *dollars*, and a contested franchise."

Said annual reports are made out on printed stationers' blanks. The words that are underlined as above set forth are printed in the blank forms. The remaining words quoted are filled in on the blanks in handwriting.

The first of the reports above referred to, filed on the 18th day of January, 1901, was made by
444 Jesse Larrabee and George L. Weed, two of the persons who make affidavits in support of the present application, and were acknowledged before Wayne W. Wilson as a notary public, the said Wayne W. Wilson being the person making the principal affidavit in support of this application.

The report filed on the 20th day of January, 1902, is signed by George L. Weed as Secretary and Treasurer of the New York Electric Lines Company, and by no one else, and is not acknowledged or sworn to by him or by any other officer or director of the New York Electric Lines Company.

445

The Great Eastern Telephone Company has never been assessed for a franchise tax, and in the years 1908, 1909 and 1910, while its personal property was assessed each year at one thousand dollars, its assessment was sworn off by its officers for each of the years 1908, 1909 and 1910.

The New York Electric Lines Company, the relator, has not entered into any contracts with telephone users. All that has been done is to obtain certain applications for telephone service in the forms and manner referred to in the affidavits herewith submitted, which do not obligate the said 446
New York Electric Lines Company to do anything whatever.

With reference to the statement contained in said affidavit of Wayne W. Wilson, that

> "Over one hundred thousand contracts have been shown to this deponent signed by residents of the City who desire to have telephonic communications with one another and with the world outside of the City by means of the wires to be provided by the New York Electric Lines Company,"

447

the facts are that the so-called contracts are nothing more than the applications referred to and are not contracts of the New York Electric Lines Company and do not obligate the New York Electric Lines Company in any way. All of them were obtained many years ago, many of them are signed by persons who are now dead, or have moved away, and many more of them are admittedly not authentic contracts. The facts more fully appear in the affidavits herewith submitted.

448 The Great Eastern Telephone Company has not made contracts with 107,000 subscribers in New York City to supply them with telephones and telephonic connections, both local and long distance. The so-called contracts are merely applications, as appears from the affidavits herewith submitted, nor did the Great Eastern Telephone Company obligate itself in any wise in connection therewith.

The statements contained in the following paragraphs of the affidavit of D. A. Reynolds, forming part of the moving papers, are not true:

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"(1) The New York Electric Lines Company has obligated itself to furnish telephonic communications and facilities of every kind and nature to all the telephone subscribers which we may provide in the territory covered by its franchise from the City of New York.

"(2) The Great Eastern Company has agreed to furnish telephone to the said subscribers at rates approximately one half of the rates now charged by the New York Telephone Company, the only telephone company now operating in said territory.

450 "(3) The Great Eastern Company has entered into contracts with other independent companies and has agreed to connect its comprehensive system of telephones in New York City with independent lines which are seeking such connections in and with the City of New York."

The so-called contracts which the New York Electric Lines Company claims to have entered into with telephone users are not, in fact, contracts, but merely forms of application, and none of them

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purports to be made with or directed to the New York Electric Lines Company, the relator, but are directed to the Great Eastern Telephone Company. The contracts which are referred to in the affidavit of Wayne W. Wilson, as having been shown to him and which are alleged to be signed by residents of the City who desire to have telephonic communication with one another and with the world outside of the city by means of wires to be provided by the New York Electric Lines Company are in fact nothing more than applications addressed to the Great Eastern Telephone Company, and 452
to which the New York Electric Lines Company, the relator, is not a party. None of the said applications, or so-called contracts, obligates the New York Electric Lines Company, or even the Great Eastern Telephone Company, to do anything.

At the time of the last application by the relator to the Commissioner of Water Supply, Gas and Electricity for a permit to lay conduits, it was stated that over 30,000 subscribers had agreed in writing to use and pay for telephone service, and in a brief filed by the New York Electric Lines Company before the corporation counsel in support of such application the relator stated that the 453
number had since increased to 97,000 within three months. 67,000 additional contracts made within three months would require the making of about nine hundred contracts for every business day. That would seem to be incredible, especially in view of the fact that the New York Electric Lines Company had no facilities whatsoever for the transaction of a telephone business.

These alleged contracts have not been submitted to any municipal authority or to any court. Such applications or alleged contracts as there are, have

been made, not with the New York Electric Lines Company, but with the Great Eastern Telephone Company.

The capital stock of the New York Electric Lines Company was fixed in its certificates at five million dollars, which the relator has stated in an official report for the year 1899 to the State Board of Tax Commissioners was issued for patents (that have long since expired). On April 10, 1883, the Board of Aldermen granted permission to the relator to lay wires underground through the City under
455 specified conditions and restrictions, and the company filed its alleged acceptance on April 16, 1883.

It claims that on May 8, 1883, it filed a map in the office of the clerk of the county, showing the routes of its proposed conduits or electrical conductors.

With respect to the statement contained in the affidavit of Wilson, forming part of the moving papers, that after the grant of its alleged franchise the company thereupon laid out its comprehensive system for conduits in the City of New York and duly filed maps and plans in the County Clerk's office on the 18th day of May, 1883, in accordance
456 with the city ordinances, the facts are that it did not file any map or plan under its alleged franchise but only such a map or plan as was required of all companies operating under the general ordinance "to regulate the laying of subterranean telegraph wires and electric conductors in the streets of the city" passed by the Common Council and approved by the Mayor December 14th, 1878. It did nothing more than make and file that map, attempting to pre-empt in a wholesale way every street in the city, and did not lay out a comprehensive or other system of conduits, except by tracing lines on the map and filing it in the County Clerk's office.

457

No maps were ever filed by the company with the Board of Commissioners of Electrical Subways, nor was any application to the said board ever made by the company for approval of its plans, for permission to lay conduits, or to open the streets, or for any other purpose whatever.

The first year of the relator's incorporation expired on October 14, 1883. Up to that time it had taken some steps toward its corporate organization, obtained its alleged grant from the Board of Aldermen and perhaps filed a map, and that is substantially all. It had not obtained a permit to actually 458
open any street, nor had it opened a foot of street nor laid a foot of wire, nor has it ever done so. There is nothing to show that during that period it had any plans approved, or material or appliances for entering upon the construction of subways or underground electrical conductors. It did not apply to any local authority for a permit to enter upon its work of opening the streets for more than two years after this time, and when applied for it was denied.

From 1883 to 1886 the New York Electric Lines Company sought not to carry out any plan or work of its own, but from 1884 to 1886 it sought to secure 459
from the Board of Commissioners of Electrical Subways a contract to build and operate a general system of subways in accordance with the plans and specifications of the Commission.

Not until the summer of 1886 was anything further done. On July 20, 1886, the company made application to the Commissioner of Public Works (ignoring the Board of Commissioners of Electrical Subways) for a permit to open the streets, which was denied by the Commissioner on August 23, 1886.

460 On July 22, 1886, two days after the relator's application to the Commissioner of Public Works, to open the streets, the Board of Commissioners of Electrical Subways made a contract with the Consolidated Telegraph and Electrical Subway Company for the construction and management by the latter of a system of subways in New York City for the accommodation of all duly authorized companies operating or intending to operate electrical conductors in the streets of the city. On April 7, 1887, a further agreement was made between the
461 same parties amending and modifying the agreement of July, 1886. On June 25, 1887, the Legislature passed an act in relation to electrical conductors in the City of New York (Laws of 1887, Chapter 716), constituting the Board of Subway Commissioners, together with the Mayor of the City, for the time being, the Board of Electrical Control, and ratifying the agreements theretofore made with the Consolidated Telegraph and Electrical Subway Company.

By the act Chapter 231 of the Laws of 1891, the contract between the City of New York and the Empire City Subway Company hereinbefore re-
462 ferred to, was expressly authorized.

The statement contained in the affidavit of Wayne W. Wilson, that in October, 1882, the New York Electric Lines Company was organized and it at once actively began business, is not true. Said company never began its corporate business and never laid a foot of wire or did anything whatever beyond obtaining its alleged franchise or permit, except to carry on experiments with regard to patents and litigation in an attempt to construct a general subway conduit plan, deliberately turning its back on the business which it was incorporated by law to conduct.

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With respect to the statements contained in the affidavit of Wilson that the art of placing electric wires underground for electrical purposes was then (in October, 1882), in its infancy and was not understood, and that electrical insulation of wires, as well as their proper protection from moisture and other elements was in its experimental state, the facts are that while it is true that in 1882 the art had not advanced to its present high state, there was a practicable method of conducting electricity underground for high and low tension wires which was availed of by those engaged in the business.

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In the complaint of the New York Electric Lines Company against John D. Crimmins, the Electrical Subway Commissioners and others, referred to elsewhere in this affidavit, the plaintiff alleged:

> "Plaintiff's system is now completely developed and embraces not only wire conduits, but the highest requirements of electrical science in conductors and cables for use in its said conduits. In the spring of 1885 plaintiff's system was ready for immediate construction, and plaintiff was about to proceed therein."

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That complaint was verified by Sidney F. Shelbourne as president of the New York Electric Lines Company on September 27, 1886.

It thus appears from the foregoing that for a quarter of a century from the time when the relator says that the plaintiff's system was ready for immediate construction the relator has lain by, and the present attempts to excuse its inaction are an idle pretense.

With regard to the statement contained in the affidavit of Wayne W. Wilson as follows:

466 "It (the relator) began the business of manufacturing and testing (partly under its patents pending and afterwards granted) of its insulated wires, conduits and other devices and appliances. It carried on this part of its business in establishments which it leased in Greenwich, Gold and Cherry Streets, in this city. This part of its business included experiments which, at first, were not wholly successful, but which were brought to such a point as to be entirely practicable in 1885 and 1886."

467 The facts are that it had no factory or factories in New York City, and if it carried on any experiments they were carried on in secret. In 1885 and 1886, the date when the affiant says that its experiments were brought to a point to be entirely practicable, the laying of underground conduits and electrical conductors had come to a high state of proficiency, but the relator was not known as a producer and none of its wares was placed upon the market so far as I know, and I could not have failed to know in view of my familiarity with the business.

468 It is not true that during all the years from 1883 to 1892 efforts were made by the New York Electric Lines Company to place wires underground. The fact is that during the years from 1883 to 1892 the efforts of that company were wholly confined to legal proceedings in an attempt to instal a system of conduits, not wires, underground, which efforts were wholly unsuccessful.

There is no evidence even from the statements made on behalf of the relator showing at what time any particular thing was done in the way of preparation, nor even as to what was done; the state-

ments are exceedingly vague and uncertain. It is certain that nothing was ever done or attempted in the way of actual construction or operation.

On April 9, 1892, the Legislature passed an act (Laws of 1892, Chapter 263), extending the term of office of the Board of Electrical Control and modifying the act of 1887 in some respects. This act contained a provision "that this act shall not affect the rights of any corporation or individual inconsistent herewith, respecting which any litigation is pending in the Supreme Court of the United States," which the relator claims applies to it but 470
it has no bearing on the present application.

This act of 1892 contains a provision that no permit to open the streets for underground construction shall be granted unless "there is an existing demand for the construction of such conduits or subways; nor unless the occupation of said conduits or subways is reasonably assured, and the public interest require the construction thereof."

There was not at the time of the demand of the relator hereinbefore referred to, nor at the time of the commencement of this proceeding, nor is there now, an existing demand for the construction of 471
such conduits or subways as have been applied for by the relator, nor was nor is the occupation of said conduits or subways reasonably assured, nor do the public interests require the construction thereof.

Said act of 1892 contained no limitation whatever on the carrying on of a telegraphic or telephonic business such as the relator now claims it was empowered at all times to do.

As to the relator's alleged expenditures in its business prior to 1892, the respondent has no knowledge and no means of ascertaining the exact facts, but it will be observed from the moving papers that

the alleged expenditures were, it is claimed, "largely for patents and for manufacturing," neither of which was in the direct line of its business and none of which resulted in the laying of a foot of wire or the construction of a foot of conduit.

As to the statement contained in the affidavit of said Wilson that

> "Since 1900 more than four hundred thousand dollars has been expended in the Company's business,"

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the fact is that the New York Electric Lines Company failed to lay a foot of wire or a foot of conduit subways, and so far as I have been able to ascertain after diligent inquiry, they have not expended any money otherwise than in unsuccessful litigations in their attempt to establish a right to do a conduit business instead of a telegraphic and telephonic business.

It is not true that there has been expended in and about the business of said New York Electric Lines Company from 1900 to date a sum in excess of four hundred thousand dollars. It will be observed from the moving papers that only an unspecified portion of that alleged sum has been expended directly by the company; the rest of it being alleged to have been expended "by its stockholders and those in contractual relation with the company or its stockholders," evidently referring to the Great Eastern Telephone Company and others with whom the relator claims to have contractual relations.

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The sum alleged in said affidavit of Wayne W. Wilson to have been "expended in reliance upon the charter and franchise rights of the company

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and the decisions of the Courts declaring them to be irrevocable" could not have been and were not so expended, for the reasons, among others, that it has been a matter of public record that the alleged franchise was revoked in May, 1906, and there has been no decision of any Court declaring the charter and franchise rights of the company to be irrevocable.

From my familiarity with the telephone business in the City of New York since its inception I am in a position to state, and do state, that no part of the moneys alleged in the moving papers to have 476
been disbursed or expended in the business of the New York Electric Lines Company was ever expended in the business for which the said company was created, as specified in its certificate of incorporation. I know of my own knowledge that it never has conducted or attempted to conduct a telegraph or telephone business in the City of New York. Some moneys were expended by Mr. Shelbourne, the former president of the company, and by those associated with him in an endeavor to instal a conduit system in the City of New York, but the public authorities and the Courts uniform- 477
ly held that the New York Electric Lines Company had no right to instal such a conduit system and in fact no part of any such system was ever installed in the City of New York, or attempted to be installed otherwise than through proceedings in the Courts which were all held to be unfounded.

With respect to the allegations in the moving papers touching the alleged activity of the New York Electric Lines Company with regard to patents, that was all prior to the 27th day of September, 1886, for in a complaint verified on that

day by Sidney F. Shelbourne, the president of the New York Electric Lines Company, who was himself the alleged inventor and patentee, in the action elsewhere referred to, brought by The New York Electric Lines Company against John D. Crimmins, the Board of Electrical Commissioners and others, it was stated that

> "Plaintiff has obtained in faith of said contract as many as seventeen patents for its said work besides many inventions not yet patented."

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The fact of the matter is that everything that was done in the patent line was done by Sidney F. Shelbourne, who was a lawyer and inventor, in his own name, and none of the patents was assigned to the company until after Shelbourne's death, as appears from the assignment of patents set forth in the moving papers.

Furthermore, none of said patents was of any practical utility, and none ever went into commercial use. They all expired more than seven years ago.

480 The affidavit of Wayne W. Wilson (which is the main affidavit in support of the present application), is replete with statements of law and the effect of legal proceedings, although Mr. Wilson does not appear to be a lawyer. I submit that such statements of law and the effect of legal proceedings form no proper part of moving papers in an application for a mandamus, but lest it might appear that the respondent acquiesces in such statements it seems better to set forth the respondents' refutation of the same.

On September 7, 1886, the company brought mandamus proceedings in the Court of Common Pleas

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to compel the Commissioner of Public Works to issue the permit applied for, to open the streets, and which had been denied by him. On October 22, 1886, the Court made an order denying the application for a mandamus, the opinion by Allen, J. (reported 1 State Reporter 633) having been handed down, in which it was held that the Subway Commissioners had jurisdiction over the laying of wires, that the act of 1885 was constitutional and a valid exercise of police power, and "that the Commissioner of Public Works was correct in his refusal to allow a permit to the relator to open 482
the streets for the purpose of laying its conduits, on the ground that its plans had not been approved by the Board of Subway Commissioners as required by Section 3 of the Act of June 13, 1885."

This decision was affirmed by the General Term of the Court of Common Pleas (14 Daly, 154), by the Court of Appeals (107 N. Y., 593), and finally by the U. S. Supreme Court (145 U. S., 175). Later opinions upon later applications are to be found reported in 51 Misc., 413, affirmed 115 App. Div., 254; 188 N. Y., 523.

With reference to relator's litigation referred to 483
in Mr. Wilson's affidavit, the New York Electric Lines Company persistently turned its back on the business of telegraphing and telephoning and disclaimed any intention of engaging in such business, as appears elsewhere in these answering papers, and none of its litigations was directed towards carrying on any such business but towards carrying on a distinct business of constructing and maintaining subway conduits.

The application of Daniel L. Gibbens which was made by him as "counsel" for the Board of Com-

484 missioners of Electrical Subways, in October, 1886, to the attorney general, the Honorable Dennis O'Brien, to dissolve the New York Electric Lines Company (referred to in the moving papers), was objected to by relator upon a number of grounds, chiefly that the law did not know such a capacity as "Gibbons, as counsel, etc." and that there was therefore no case before the Attorney General, and on the other ground that there was no allegation in the complaint that the company "has never yet commenced the business for which
485 it was incorporated" and that Section 1785 of the Code was the only section that applied, and that under such section only a creditor or stockholder could make application, and that Gibbons was neither a creditor nor stockholder.

The denial of the application was without opinion and not upon any specific ground, and may, therefore, have been upon any one of the grounds urged against it.

The statement contained in the moving affidavit of Wayne W. Wilson that in both of the opinions rendered in the former proceeding "it is held that
486 the franchise and its acceptance by the company constituted an irrevocable contract between the City and the company" is wholly at variance with the decisions of the Courts, which may best be ascertained by a reference to the opinions and decisions of the Courts in the former proceedings, all of which are of public record.

The statements contained in the affidavit of J. Aspinwall Hodge as follows:

> "5. The Empire Company in March, 1906, filed a brief with the Corporation Counsel in

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which its counsel sought to sustain the unfounded allegation and contention that the company had forfeited its franchise by nonuser.

"6. Such a contention raises no issue which can be availed of by the Empire Company as has been decided in the Long Acre case, reported in 188 N. Y., 361.

"It is not only unfounded in fact but it is an issue which has twice been raised by applications instigated by the subway and Bell Telephone interests, made to attorney generals of the state and on both occasions, one in 1886, and one in 1906, it was held that there had been no forfeiture of the company's charter or franchise."

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are not true. The Empire Company did in or about March, 1906, file a brief with the corporation counsel, but the contents of such brief are not correctly stated.

The City was not represented in the proceeding referred to in paragraph 9 of Mr. Hodge's affidavit, the corporation counsel, as appears from the record in the appeal in the former proceeding (188 N. Y., 523) having merely sent a representative to Albany to watch those proceedings.

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Referring to the extract from the brief of the Corporation Counsel in People ex rel. Electric Lines against Ellison, 188 N. Y., 523, set forth in the moving affidavit,

"It is well to bear in mind that the present claim of relator is not the right to lay wires in subways, a right which no one disputes if exercised by an application to the discretion

490 of the Commissioner of Water Supply, Gas and Electricity, but it is, on the contrary, an alleged 'right to construct subways or conduits beneath the surface of certain streets in the City of New York and for permits to open certain streets for the purpose of such construction work,'"

the quotation standing alone is misleading for the reason that in the same brief the Corporation Counsel urged:

491 "Point IV. The relator did not organize and commence the transaction of its business within one year from the date of incorporation, and therefore its corporate powers ceased after the expiration of that year.

"Point VI. Its failure to proceed under its corporate powers to construct, use or operate telegraph or other electrical conductors for twenty-four years, has forfeited and abandoned whatever franchises of relator which may have survived its failure to commence its authorized business.

492 "Point VII. The company having done acts amounting to a non-user and abandonment of the permission granted by the municipal authorities, the City was empowered and justified in revoking any rights under such permission that may have survived to the company.

"The Company acquired no vested rights, but at most a license, which was never acted on."

Said brief is full of contentions made by the Corporation Counsel that the relator had no life or

standing at the time of its former application, and the isolated quotation in the moving papers from that brief was merely a concession for the sake of the argument alone, and not a statement of the City's position on the subject, for, as the moving papers themselves show, the application of the relator had been denied by the Commissioner upon the express ground that

> "The New York Electric Lines Company has no valid franchise or rights in the streets of the City, nor has it a legal corporate existence," 494

and coincidental therewith the Corporation Counsel had advised the Board of Estimate and Apportionment to adopt, and that Board had adopted, a resolution in the following words:

> "RESOLVED, that any and all rights or privileges for the use of the streets, if any such rights or privileges still exist, acquired by said New York Electric Lines Company, under the permission granted said Company by the said resolution of the Board of Aldermen, passed April 10, 1883, be and hereby are revoked and 495 terminated, and the resolution of the Board of Aldermen adopted on such date is hereby in all respects repealed and revoked,"

a copy of which was forthwith served on the relator and was afterwards urged by the City in resistance to the application made by the relator in the proceeding which was finally decided in 188 N. Y., page 523.

So it is idle for the relator to claim any recognition of its life or franchise by the City when the

496 brief from which they quote teemed with arguments in opposition to the very life and existence of the franchises claimed by the relator.

The abandonment of the last appeal taken by the New York Electric Lines Company, the relator, to the Supreme Court of the United States, referred to in the moving papers, was not because the said company had examined carefully engineering and expert advice as to the practicability and relative cost of building its own ducts and of leasing space in those of the Empire Company, but because of the
497 collapse of the Bidwell & Jackson option referred to in the annexed affidavits, the said scheme and said appeal to the United States Supreme Court being interlaced.

With respect to the statement contained in the moving affidavit of D. A. Reynolds that

> "After careful examination by various able counsel, the Great Eastern Telephone Company entered into a contract with the New York Electric Lines Company, relying upon the charter of that Company and its franchises to place wires in the streets of New York, and also into
> 498 contracts with other independent telephone companies who are seeking to have connections in New York City for the purpose of long distance telephonic communication with all parts of the state and country."

the facts are that no such contracts have been entered into, the only existing arrangement at the time of the commencement of this proceeding being one whereby the Great Eastern Telephone Company has the entire ownership of the said New York Electric Lines Company. The facts more fully ap-

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pear in the affidavits herewith submitted. Furthermore, the alleged contracts with so-called "other independent telephone companies" are not between such companies and the New York Electric Lines Company but between them and the Great Eastern Telephone Company. Still further, the said D. A. Reynolds was an officer of each and all of said companies with whom said alleged contracts are claimed to have been made, and made the same on behalf of all parties thereto, and the said Reynolds knew at all times the facts herein set forth with respect to the so-called charter and franchises.

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The allegations contained in the affidavit of said Wilson as follows:

> "It (the relator) has more recently employed a force of engineers who have planned a comprehensive system of wires to be installed in the conduits of the Empire City Subway Company to supply telephone users, and especially the Great Eastern Telephone Company with wires, and in reliance upon its charter and franchise rights upwards of one hundred thousand contracts have been entered into with residents of New York City who are desirous of securing telephone facilities and other contracts have been entered into with independent telephone companies outside the City of New York"

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are not true.

The alleged force of engineers has not been employed by the New York Electric Lines nor has such alleged force planned a comprehensive system of wires as alleged. Whatever has been done in that direction has been done by the Great Eastern Telephone Company. The alleged contracts,

502 which are stated to number upwards of one hundred thousand have not been entered into with the New York Electric Lines Company but are the applications directed to the Great Eastern Telephone Company referred to elsewhere in this affidavit.

The Empire City Subway Company (Limited), is not in or under the control of the American Telephone and Telegraph Company.

There are numerous allegations in the moving papers of matters which are not within the knowledge or means of knowledge of affiant or the Em-
503 pire City Subway Company (Limited) or its other officers, and with respect to which they have no means of informing themselves, and for that reason the Empire City Subway Company (Limited) does not, by failing to deny such alleged facts, admit the truth of them.

The writ of mandamus applied for by the relator should be denied on the merits, or if not denied on the merits it should be denied in the exercise of the court's discretion.

J. H. CAHILL.

504 Sworn to before me this
2nd day of August, 1910.

HERBERT L. SEWARD,
Notary Public,
Kings Co.

Certificate filed in New York Co.

Approved Resolution No. 12, Annexed to the Affidavit of J. H. Cahill, Read in Opposition to Motion. 505

BOARD OF ESTIMATE AND APPORTIONMENT.

CITY OF NEW YORK.

In the matter of the revocation of the permission granted to the
NEW YORK ELECTRIC LINES COMPANY
by resolution adopted by the Board of Aldermen April 10, 1883. 506

See minutes May 11, 1906, pages

WHEREAS,

The New York Electric Lines Company, under a resolution of the Board of Aldermen, passed April 10, 1883, claim to have received permission to open the streets of the city and construct subways in which to place wires for telegraphic and telephonic communication and for electric illumination, and by reason thereof claims a perpetual franchise in the streets of the city; and 507

Whereas, The said company has failed and neglected to construct such subways and lay said wires for over twenty-three years, and now seeks leave to open the streets, and construct subways and lay wires therein for the use of the Great Eastern Telephone Company, under its said alleged perpetual franchise therein; and

Whereas, If said company has not lost its corporate existence and all its charter rights and privileges, by reason of its failure to satisfy and comply with the terms of the statutory enactments applic-

able thereto, in the opinion of this Board, it has long since forfeited by reason of non-user all rights and privileges it may have secured under the permission granted by said resolution of the Board of Aldermen on April 10, 1883; it is therefore

RESOLVED,

That any and all rights or privileges to the use of the streets, if any such rights or privileges still exist, acquired by said New York Electric Lines
509 Company under the permission granted said company by the said resolution of the Board of Aldermen passed April 10, 1883, be and hereby are revoked and terminated; and the resolution of the Board of Aldermen adopted on such date is hereby in all respects repealed and revoked.

A true copy of resolution adopted by the Board of Estimate and Apportionment May 11, 1906.

JOSEPH HAAG,
Secretary.

The foregoing resolution is hereby approved.
510

GEO. B. McCLELLAN,
Mayor.

Dated, New York, May 18, 1906.

I HEREBY CERTIFY that the foregoing is a true copy of the original approved resolution as filed in this office.

WILLIAM W. LAURENCE,
Assistant Secretary,
Board of Estimate & Apportionment.

Affidavit of Andrew J. Shipman, Read in Opposition to Motion.

511

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

512

County of New York, ss.:

Andrew J. Shipman, being duly sworn, says:

A search of the records in the Department of Taxes and Assessments in the City of New York made by me since this application was brought shows the following facts:

The New York Electric Lines Company has never paid any personal taxes on property within the County of New York. During the current year (1910), the records show that the said Company was assessed for $100,000 taxes on its personal property but that the assessment was sworn off by its officers and that it is not assessed or taxed for any sum whatever.

513

The Tax Office records show as to franchise taxes as against the New York Electric Lines Company: "May 18, 1906, all privileges revoked in App. Papers, Board of Estimate and Apportionment,

514 G. B. McClellan, Mayor," and no franchise tax has been levied or assessed against the New York Electric Lines Company for the years 1909 and 1910. A tax on the franchise valuation had theretofore been assessed and levied against the New York Electric Lines Company for the years 1907-1908 of $10,000 in each year. The tax on these two valuations for the years 1907-1908 were paid, as appears by the books of the Receiver of Taxes, on the 30th of June, 1910, the very day before the moving affidavits in this proceeding, which state that all taxes
515 had been regularly paid, were verified.

In the sworn report signed by D. A. Reynolds in his official capacity, filed by the New York Electric Lines Company for the year 1910, for the express purpose of escaping taxation (under said assessment of $100,000), it is stated on the printed blank as follows:

> "15. The assessed value of the corporation real estate in this State including its special franchises.
>
> Answer: Nothing."

516 In his report the New York Electric Lines Company also stated to the Tax Commissioners that it had no real estate, machinery, plant, goods, wares, merchandise or other tangible personal property and that it had no cash on hand or on deposit, nor debts due from solvent debtors, nor shares of stock of other corporations and that the aggregate of its assets was nothing.

A further search in the Department of Taxes and Assessments during the current month shows the following facts with respect to the personal taxes of the Great Eastern Telephone Company:

In 1907 the personal property of that Company was assessed at $100,000 but it was reduced upon its sworn report to $1,000. In 1908-1909-1910, its personal property was assessed each year at $1,000, but in each instance such assessment was sworn off in its report and no taxes whatever has been assessed against or paid by said Company for the years 1908-1909-1910.

In connection with its report for 1910 upon which it was relieved this year from taxation there is filed in the office of said Department of Taxes and Assessments a letter of D. A. Reynolds, President of the Great Eastern Telephone Company (who is also an officer of the New York Electric Lines Company), as follows: 518

"New York January 24, 1910.

Department of Taxes and Assessments,
Hall of Records, New York.

Gentlemen:

In enclosing the within blank I would state that the Great Eastern Telephone Company is 519
incorporated for $1,000,000 and will ultimately be used as an operating telephone company under a franchise granted in 1883, but at the present time has no property, has never issued more than the organization shares, fifteen in number, which have been signed in blank and now repose in the company's safe.

Very truly yours,

D. A. REYNOLDS."

520 A further search during the present month in the said Department of Taxes and Assessments shows that the Great Eastern Telephone Company has never at any time been assessed for a *franchise tax*.

in the sworn report signed by D. A. Reynolds in his official capacity, filed by the Great Eastern Telephone Company, for the year 1910, for the purpose of escaping taxation, it stated on the printed blank as follows:

521 "15. The assessed value of the corporation real estate in this State including its special franchise.

Answer: Nothing."

In this report the Great Eastern Telephone Company stated to the Tax Commissioners that it had no real estate, machinery, plant, goods, wares, merchandise or other tangible personal property and that it had no cash on hand or on deposit, nor debts due from solvent debtors, nor shares of stock of other corporations and that the aggregate of its assets was nothing.

522 I am unable to produce on this hearing the originals of the said records and writings for the reasons that the Commissioners of Taxes and Assessments refused to allow them to leave their offices without an order from the Court and will not allow them to be physically copied.

ANDREW J. SHIPMAN.

Sworn to before me this
27th day of July, 1910.

HENRY HUDSON,
Notary Public,
New York County.

Affidavit of William Conover, Read in Opposition to Motion. 523

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited). 524

State of New York, }
County of New York, } ss.:

William Conover, being duly sworn, deposes and says; that he is over the age of twenty-one years; that he resides in the Borough of the Bronx, in the City of New York.

That he is in charge of a department in the office 525
of the Transfer Tax Attorney for the New York County of the New York State Comptroller.

That he has had an examination made of the records in the office of the Comptroller of the State of New York relating to the Great Eastern Telephone Company and the New York Electric Lines Company, both New York corporations, and of the reports filed by said companies in said Comptroller's office.

Attached hereto and made a part of this affidavit (Exhibit A) is a copy of the capital stock report filed in said Comptroller's office by the New York

Electric Lines Company for the year ending October 31st, 1909. Said report was executed by D. A. Reynolds, Treasurer, on March 15th, 1910, and under the heading "Remarks" the following appears:

> "There has been no material change in the affairs of the company since our report of 1905. Litigation of the company's franchise rights has not yet been fully completed and no value can be placed on stock or franchises until the final result of litigation is known."

All previous capital stock reports of this company are of the same tenor.

Attached hereto and made a part hereof (Exhibit B) is a copy of the report of the gross earnings for business within the State of New York of the New York Electric Lines Company for the year ending June 30th, 1909, as filed in said Comptroller's office. Said report was executed by D. A. Reynolds, Treasurer, upon August 30th, 1909. "Nothing" is the answer to all questions in this report, and all previous gross earnings reports are of the same tenor.

528 Attached hereto and made a part hereof (Exhibit C) is a copy of the capital stock report of the Great Eastern Telephone Company for the year ending October 31st, 1909, as filed in said Comptroller's office. Said report was executed by D. A. Reynolds, President. Under the heading of "Remarks" appears the following:

> "This company took out its charter for the purpose of assuming the title until it could acquire the necessary franchise rights to conduct a telephone business in New York City.

529

The undersigned, being the President of the above company estimates and appraises the capital stock of said company as follows: ———shares at no sale and no value established."

All previous capital stock reports of this company are of the same tenor.

Attached hereto and made a part hereof (Exhibit D) is a copy of the gross earnings report of the Great Eastern Telephone Company for the year ending June 30th, 1909, as filed in said Comptroller's office. Said report is executed by William J. Lansley, President, on September 10th, 1909. "Nothing" is the answer to all questions therein, and under the seventh question, being "Additional Questions as follows" appears the answer "Company is not an operating company." All previous gross earnings reports are of the same tenor. Said company has never filed a franchise tax report with the New York State Board of Tax Commissioners.

530

The Great Eastern Telephone Company has never paid a tax to the State of New York, either on the capital stock or on gross earnings.

531

The New York Electric Lines Company paid a tax only on $1,000 capital stock from 1901 to 1904, and on $10,000 capital stock for the year 1905. No other tax has been paid by said company to the State of New York.

WILLIAM CONOVER.

Sworn to before me this
29th day of July, 1910.

MARY B. JUSTICE,
Notary Public.

(Seal)

532 **Exhibit "A", Referred to in the affidavit of William Conover, Read in Opposition to Motion.**

Each statement must be full and explicit.

TO THE COMPTROLLER OF THE STATE OF NEW YORK:

As Treasurer of the New York Electric Lines Company I make the following report of such Company for the year ending October 31, 1909, pursuant to the provisions of Section 182, Chapter 60
533 of Consolidated Laws:

(1) The last preceding report made by this Company to the Comptroller of the State of New York under the provisions of the above acts was for the year ending October 31, 190

(2) Organized , 190 , under the laws of

(3) This Company began business in State of New York on , 190

(4) Authorized capital stock of Com-
534 pany $

(5) Number of shares of stock authorized, Common , Preferred

(6) Number of shares of stock issued, Common , Preferred

(7) Par value of each share Common $
Preferred $

(8) Amount paid into Treasury of Company on each share Common $
Preferred $

(9) Amount of Capital stock issued for cash or property $

Exhibit "A," Referred to in the Affidavit of William Conover. 535

(10) Amount of Capital stock issued for good will, copyright brands, patents, trademarks, formulae, services, etc., other than cash or property $

(11) Amount of common stock on which dividends were declared $

(12) Amount and date of each dividend on common stock

(13) Rate per cent. per annum of dividends on common stock 536

(14) Amount of preferred stock on which dividends were declared $

(15) Amount and date of each dividend on preferred stock

(16) Rate per cent. per annum of dividends on preferred stock

Dividends

(17) Nature of business in State of New York and how transacted

(18) a Place street and number where such business was conducted
b Present postoffice address of the Company 537
(Place, street and number)

(19) Average value of stock in trade carried in the State of New York during the year ending October 31, 1909 $

(20) Average monthly bank balance employed in the State of New York during the year ending October 31, 1909 $

(21) Average value of bills and accounts receivable in State of New York during the year ending October 31, 1909 $

538 *Exhibit "A," Referred to in the Affidavit of William Conover.*

(22) Average value of shares of stocks of other corporations doing business in the State of New York and owned by this company during the year ending October 31, 1909 $

(23) Average value of personal property including bonds, loans on call and other financial securities employed in the State of New York, other than heretofore mentioned, during the
539 year ending October 31, 1909 $

(24) Capital invested in real estate located in the State of New York during the year ending October 31, 1909, and where situated $

(25) Total of assets above enumerated located in the State of New York during the year ending October 31, 1909 $

(26) Average value of stock in trade carried outside the State of New York during the year ending October 31, 1909 $

540 (27) Average monthly bank balance employed outside the State of New York during the year ending October 31, 1909 $

(28) Average value of bills and accounts receivable outside the State of New York during the year ending October 31, 1909 $

(29) Average value of shares of stocks of other corporations owned by this corporation, where such corporations are doing business wholly without the State of New York $

Exhibit "A," Referred to in the affidavit of William Conover. 541

(30) Average value of personal property including bonds, loans on call and other financial securities employed outside the State of New York, other than heretofore mentioned, during the year ending October 31, 1909

(31) Capital invested in real estate located outside the State of New York during the year ending October 31, 1909, and where situated $

(32) Total of assets located outside the State of New York during the year ending October 31, 1909 $ 542

LIABILITIES:

Bonds $

Mortgages not secured by bonds $

Bills payable $

Accounts payable $

Other liabilities, excluding capital stock $

Total liabilities $ 543

(33) Highest bona fide price at which stock sold during year ending October 31, 1909 Preferred $

Common $

(34) Lowest bona fide price at which stock sold during year ending October 31, 1909 Preferred $

Common $

(35) Percentage of capital stock of the company employed in the State of New York during the year ending

544 *Exhibit "A." Referred to in the affidavit of William Conover.*

October 31, 1909, in manufacturing and in the sale of the product of such manufacture

(36) Are your goods manufactured for you by others?

(37) Do you operate a factory?

REMARKS.

545 There has been no material change in the affairs of the Company since our report of 1905. Litigation of the Company's franchise rights has not been fully completed and no value can be placed on stock or franchises until the final result of litigation is known.

The Undersigned, being the Treasurer of the above Company, estimates and appraises the Capital Stock of said Company as follows:

shares at dollars cents per share, amounting in the whole to /100 dollars.

546 IN WITNESS WHEREOF, I have set my hand this 15th day of March, 1910.

D. A. REYNOLDS,
Treasurer.
(Official Title)

State of New York, } ss.:
County of New York, }

On this 15th day of March, A. D. 1910, personally appeared before me, a Notary Public in and for the County of New York, D. A. Reynolds, Treasurer of the above-named Company, who, being duly sworn according to law, did depose and say that

Exhibit "A." Referred to in the affidavit of William Conover. 547

the foregoing report is just, true and correct and that it includes all dividends of any description declared by said Company during the year ending October 31, 1909, and that he has, according to his best knowledge and belief, appraised the Capital Stock of the Company as provided by statute, at not less than the average price at which it sold and not less than the difference between its assets and liabilities, exclusive of Capital Stock.

D. A. REYNOLDS, 548
Treasurer.

Sworn to before me the day
and year aforesaid.

MARTIN B. BABCOCK,
Notary Public,
New York County.

549

550 **Exhibit B, Referred to in the affidavit of William Conover, Read in Opposition to Motion.**

A.

(Return this to Comptroller)

REPORT OF THE GROSS EARNINGS FOR BUSINESS WITHIN THE STATE OF NEW YORK.

Statement of amount received by all offices and by
551 all agents of the New York Electric Lines Company, for the year ending June 30, 1909.

Office of the New York Electric Lines Company,
(Please give P. O. address with No. and Street)
#30 Church St., Manhattan,
New York City.

August 30th, 1909.

As Treasurer of the New York Electric Lines Company, organized under the Laws of the State
552 of New York as a corporation or association, and by authority of said corporation or association I make the following report of the business of said company:

(1) Received by the company from telegraph and telephone business wholly within New York State	$ Nothing
(2) Received for District Messenger service within the State of New York	$ Nothing
(3) From Commission Offices, not included in above: Amount received	$ Nothing

Exhibit "B," Referred to in the Affidavit of William Conover. 553

(4) Amount received for lease of corporate property and privileges within the State of New York, not heretofore included:

For Telegraph lines and wires	$ Nothing
" Telephone lines and wires	$ Nothing
" Telephone instruments	$ Nothing
" Automatic telegraph instruments	$ Nothing

(5) Gross receipts from investments:

From Interest on bonds	$ Nothing 554
" Dividends on stocks	$ Nothing
" Real estate	$ Nothing
" Other property not mentioned under this head as above	$ Nothing

(6) Gross receipts from all sources, including investments $ Nothing

(7) Additional questions as follows:

(8) This report includes in the foregoing matter the amounts received from lines and property leased by the Company. The names of the leased lines are as follows: 555
None at all.

(Signed) D. A. REYNOLDS,
(Official Title) Treasurer.

State of New York,
County of New York, } ss.:
City of New York,

On this 30th day of August, A. D. 1909, personally appeared before me, a Notary Public in and for the County of New York, D. A. Reynolds, Treasurer of the New York Electric Lines Com-

556 *Exhibit "C," Referred to in the Affidavit of William Conover.*

pany, who, being duly sworn according to law, did depose and say that he is authorized to make the foregoing report, and that the items therein have been made up from the books, records and accounts in the office of said Company, and that he believes the same to be true and correct; that the items set forth are correct to the best of the knowledge and belief of deponent.

D. A. RSYNOLDS.

557

Sworn to and subscribed before me
the day and year aforesaid.

MARTIN B. BABCOCK,
Notary Public,
(L. S.) New York County.

Exhibit "C", Referred to in the Affidavit of William Conover, Read in Opposition to Motion.

558

Each statement must be full and explicit.

TO THE COMPTROLLER OF THE STATE OF NEW YORK:

As President of the Great Eastern Telephone Company I make the following report of such Company for the year ending October 31, 1909, pursuant to the provisions of Section 182, Chapter 60 of Consolidated Laws:

Exhibit "C," Referred to in the Affidavit of William Conover. 559

(1) The last preceding report made by this Company to the Comptroller of the State of New York under the provisions of the above acts was for the year ending October 31, 190 .

(2) Organized May, 1905, under the laws of New York.

(3) This Company began business in the State of New York on No business as yet.

(4) Authorized capital stock of Company $1,000,000

(5) Number of shares of stock authorized: 560

Common All

Preferred

(6) Number of shares of stock issued (Common qualifying shares endorsed and returned to treasury).

(7) Par value of each share:

Common $100

Preferred $

(8) Amount paid into Treasury of Company on each share:

Common Nothing 561

Preferred $

(9) Amount of capital stock issued for cash or property 15 qualifying $

(10) Amount of capital stock issued for good will, copyrights, brands, patents, trademarks, formulae, services, etc., other than cash or property $

562 *Exhibit "C," Referred to in the Affidavit of William Conover.*

Dividends

(11) Amount of common stock on which dividends were declared $

(12) Amount and date of each dividend on common stock

(13) Rate per cent. per annum of dividends on common stock

(14) Amount of preferred stock on which dividends were declared $

(15) Amount and date of each dividend on preferred stock

563 (16) Rate per cent. per annum of dividends on preferred stock

(17) Nature of business in State of New York and how transacted

(18) a Place, street and number where such business was conducted

30 Broadway, New York City

b Present postoffice address of the Company, 30 Church St., New York City

(Place, street and number)

(19) Average value of stock in trade
564 carried in the State of New York during the year ending October 31, 1909 $

(20) Average monthly bank balance employed in the State of New York during the year ending October 31, 1909 $

(21) Average value of bills and accounts receivable in State of New York during the year ending October 31, 1909 $

(22) Average value of shares of stocks of other corporations doing busi-

Exhibit "C," Referred to in the Affidavit of William Conover. 565

ness in the State of New York and owned by this company during the year ending October 31, 1909 $

(23) Average value of personal property including bonds, loans on call and other financial securities employed in the State of New York, other than heretofore mentioned, during the year ending October 31, 1909 $

(24) Capital invested in real estate located in the State of New York during the year ending October 31, 1909, and where situated $ 566

(25) Total of assets above enumerated located in the State of New York during the year ending October 31, 1909 $

(26) Average value of stock in trade carried outside the State of New York during the year ending October 31, 1909 $

(27) Average monthly bank balance employed outside the State of New York during the year ending October 31, 1909 $ 567

(28) Average value of bills and accounts receivable outside the State of New York during the year ending October 31, 1909 $

(29) Average value of shares of stocks of other corporations owned by this corporation, where such corporations are doing business wholly without the State of New York $

568 *Exhibit "C," Referred to in the Affidavit of William Conover.*

(30) Average value of personal property including bonds, loans on call and other financial securities employed outside the State of New York, other than heretofore mentioned, during the year ending October 31, 1909 $

(31) Capital invested in real estate located outside the State of New York, during the year ending October 31, 1909, and where situated $

569

(32) Total of assets located outside the State of New York during the year ending October 31, 1909 $

LIABILITIES:

Bonds $

Mortgages not secured by bonds $

Bills payable $

Accounts payable $

Other liabilities, excluding capital stock $

Total liabilities $

570 (33) Highest bona fide price at which stock sold during year ending October 31, 1909:

Preferred $

Common $

(34) Lowest bona fide price at which stock sold during year ending October 31, 1909:

Preferred $

Common $

(35) Percentage of capital stock of the company employed in the State of New York during the year ending

Exhibit "C," Referred to in the Affidavit of William Conover.

October 31, 1909, in manufacturing and in the sale of the product of such manufacture

(36) Are your goods manufactured for you by others?

(37) Do you operate a factory?

REMARKS.

This company took out its charter for the purpose of assuming the title until it could acquire the necessary franchise rights to conduct a telephone business in New York City.

The Undersigned, being the President of the above Company, estimates and appraises the capital stock of said Company as follows: shares at no sale and no value established dollars cents per shares, amounting in the whole to /100 dollars.

IN WITNESS WHEREOF, I have set my hand this 15th day of March, 1910.

D. A. REYNOLDS,
President,
(Official Title.)

State of New York, County of } ss.:

On this day of A. D. 190 , personally appeared before me, a Notary Public in and for the County of , of the above named Company, who, being duly sworn, according to law, did depose and say that the foregoing report is just, true and correct and that it includes all dividends of any de-

574 *Exhibit "D," Referred to in the Affidavit of William Conover.*

scription declared by said Company during the year ending October 31, 1909, and that he has, according to his best knowledge and belief, appraised the Capital Stock of the Company as provided by statute, at not less than the average price at which it sold and not less than the difference between its assets and liabilities, exclusive of capital stock.

Sworn to before me the
day and year aforesaid.
Notary Public.

575

Exhibit "D", Referred to in the Affidavit of William Conover, Read in Opposition to Motion.

A

(Return this to Comptroller)

REPORT OF THE GROSS EARNINGS FOR BUSINESS WITHIN THE STATE OF NEW YORK.

Statement of amount received by all offices and by all agents of the Great Eastern Telephone
576 Company, for the year ending June 30, 1909.

Office of the Great Eastern Telephone Company.

(Please give P. O. address with No. and Street.)
30 Church Street,

New York, Sept. 10, 1909.

As President of the Great Eastern Telephone Company, organized under the Laws of the State of New York as a corporation or association, and by authority of said corporation or association I

Exhibit "D," Referred to in the Affidavit of William Conover. 577

make the following report of the business of said company:

(1) Received by the company from telegraph and telephone business *wholly* within New York State $ Nothing

(2) Received for District Messenger service within the State of New York $ Nothing

(3) From *Commission Offices*, not included in above: 578

Amount received $ Nothing

(4) Amount received for lease of corporate property and privileges within the State of New York, not heretofore included:

For Telegraph lines and wires $ Nothing

" Telephone lines and wires $ Nothing

" Telephone instruments $ Nothing

" Automatic telegraph instruments $ Nothing

(5) Gross receipts from investments:

From Interest on bonds $ Nothing 579

" Dividends on stocks $ Nothing

" Real estate $ Nothing

" Other property not mentioned under this head as above $ Nothing

(6) Gross receipts from all sources including investments $ Nothing

(7) Additional questions as follows:

Company is not an operating company.

580 *Exhibit "D," Referred to in the Affidavit of William Conover.*

(8) This report includes in the foregoing matter the amounts received from lines and property leased by the Company.

The names of leased lines are as follows:

(Signed) WM. J. LANSLEY,
(Official title) President.

581 State of New York,
County of New York, } ss.:
City of New York,

On this 10th day of September, A. D. 1909, personally appeared before me, a Notary Public in and for the county of New York, Wm. J. Lansley, President, of the Company, who, being duly sworn according to law, did depose and say that he is authorized to make the foregoing report, and that the items therein have been made up from the books, records and accounts in the office of said Great Eastern Telephone Company, and that he believes the same to be true and correct; that the items set
582 forth are correct to the best of the knowledge and belief of deponent.

WM. J. LANSLEY.

Sworn to and subscribed before me
the day and year aforesaid.

MARTIN B. BABCOCK,
Notary Public,
(L. S.) New York County.

Affidavit of John J. Carty, Read in Opposition to Motion.

583

NEW YORK SUPREME COURT.

NEW YORK COUNTY.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

584

State of New York,
County of New York, } ss.:

John J. Carty, being duly sworn, says: I reside at Short Hills, New Jersey. I am now Chief Engineer of the American Telephone & Telegraph Company and for many years prior thereto was Chief Engineer of the New York Telephone Company and of its predecessor, the Metropolitan Telephone & Telegraph Company. Also for several years I had charge of the Switchboard and Cable Department of the Western Electric Company, which is the largest telephone manufacturing company in the world.

585

I have been for more than thirty years actively engaged in telephone engineering and have designed and installed switchboards in many different cities in the United States, including New York, Brooklyn, Boston, Buffalo, Rochester and New Haven, beginning as early as 1880, and am thoroughly fa-

586 miliar with the history and development of telephone plants and business in the United States. I have designed, constructed and reconstructed the telephone plant in the City of New York, consisting of switchboard systems, cables, telephones and all other appliances constituting the physical plant of the Company operating there. From 1880 to the present time I have been especially familiar with telephone switchboards, including multiple switchboards and those of the non-multiple type and with the patents covering the same, and I have person-
587 ally designed, constructed, installed and operated switchboards of both types in very great numbers and am thoroughly familiar with the capabilities of each. In my present position as Chief Engineer of the American Telephone & Telegraph Company I have charge of all the engineering work of that Company and of the standardizing of the switchboards, cables, instruments and all other parts of the plant. My work in connection with these affairs has been practical and upon a large and extensive scale.

I have read the Notice of Application in the
588 above entitled proceeding dated July 1, 1910, and the affidavits of Wayne W. Wilson, verified July 1, 1910, George L. Weed, verified June 27, 1910, and D. A. Reynolds, verified June 30, 1910, which are annexed to said Notice of Application. I assume that the terms "Bell telephone monopoly" and "Bell monopoly," used by the affiants in the said affidavits have reference to the American Bell Telephone Company and the American Telephone & Telegraph Company for the reason that said terms are elsewhere applied, though improperly, to said Companies in other parts of the moving papers.

The following statement contained in the said affidavit of D. A. Reynolds that

589

"until within a very few years no independent company was able to use the multiple switchboards with all their necessary appliances, for it was not until that time that the expiration of certain switchboard patents controlled by the Bell monopoly allowed the practical operation of such switchboards by others. Thus it was impossible for a comprehensive telephone system to be installed in any city approximating the size of Manhattan without the permission of the Bell Telephone monopoly and that permission could not be obtained,"

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and the similar statements contained in said affidavit of George L. Weed, are not true. The real facts are as follows: The multiple switchboard patents referred to in the foregoing extract quoted from the said affidavit of D A. Reynolds expired not a few years ago, but eleven years ago, to wit, in the year 1899, and ever since the year 1899 the use of the multiple switchboard with all its necessary appliances has been open to the use of all companies and has as a matter of fact been very largely used in different parts of the United States by the so-called independent companies, that is to say, by companies not affiliated or associated with the American Telephone & Telegraph Company.

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Prior to the expiration of these multiple switchboard patents—to be specific, from the year 1878 to the year 1899—it was at all times possible to install a comprehensive telephone system in Manhattan by the use of switchboards which were open to all, and as a matter of fact in the year 1883 (the time of the granting of the alleged franchise by The City of New York to the New York Electric Lines Company) there were in operation in what

is now the Borough of Manhattan nine telephone central offices, each employing switchboards, none of which came under the multiple switchboard patents which expired in 1899, and these switchboards were continued in service for many years after 1883, the last of them not being discontinued until the year 1891. In other words, at all times from 1878 until 1899 any company having in other respects the proper rights to operate a telephone plant and service in what is now the Borough of Manhattan would not have been prevented from
593 so doing by the existence of the multiple switchboard patents controlled or owned by the so-called Bell Companies, but could have employed well-known switchboard systems, a great many of which were then known and in actual use throughout the world and which were not covered by the patents controlled or owned by the so-called Bell Companies. By the use of such switchboard systems it would have been possible for any telephone company to have given practical, commercial telephone service on as large a scale as was at any time given during those years by the so-called Bell Companies
594 at New York or elsewhere.

The following statement contained in the said affidavit of D. A. Reynolds having reference to certain "Bell" patents that

> "Some of the original multiple switchboard patents expired about 1901, but others which were essential and necessary to the practical operation of such switchboards continued down to about the year 1905,"

is not true. As I have already stated the multiple switchboard patents held by the Bell Companies

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expired prior to 1901, namely, in 1899, and inasmuch as on the expiration of these 1899 patents the use of the multiple switchboard was free of patent control it is not true that patents perpetuating the control of these multiple switchboards continued down to about the year 1905. The multiple switchboard with all the appliances necessary to its practical operation as above stated have been open to the use of any and all persons and corporations since the expiration of said patents in 1899.

The following statement contained in the said affidavit of D. A. Reynolds that

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> "Until 1895 or 1896 the Bell Telephone monopoly controlled patents which expired in those years and which until then prevented any independent company from operating telephones,"

is also untrue. There were no patents of a controlling or fundamental nature owned by the so-called Bell Telephone Companies which expired in 1895 or 1896. It is true that the Bell Companies held a fundamental patent covering the transmission of speech by electricity and a fundamental patent covering a telephone receiver which expired in 1893 and 1894 respectively. These patents, however, were not sustained by the United States Supreme Court until the year 1889 and at no time during their life did they in fact prevent other telephone companies from entering into the telephone business in different cities of the United States in competition with the so-called Bell Companies. As a matter of fact, between the years 1883 and 1900 (the period between the granting by the City of the alleged franchise to the New York

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Electric Lines Company and the expiration of the Bell multiple switchboard patents) independent telephone companies, that is to say, companies not affiliated but in competition with the so-called Bell Companies, constructed and operated telephone plants and systems of a practical, commercial character in various cities and towns of the United States, of which a partial list is as follows, together with dates of commencement of operation:

Name of Company.	City.	Date.	Type of Switchboard.
Under the authority of The Overland Telephone & Telegraph Co.	Utica, N. Y.	1884	.....
do	Lexington, Ky.	1884	.....
"	Richmond, Ky.	1884	.....
The Clay Commercial Telephone Co.	Philadelphia, Pa.	1884	.....
The Pan Electric Telephone Co.	Fort Worth, Tex.	1884	.....
do	Dallas, Tex.	1884	.....
"	Denison, Tex.	1884	.....
"	Abilene, Tex.	1884	.....
"	Anniston, Tex.	1884	.....
Western Pennsylvania Telegraph & Telephone Co.	Pittsburg, Pa.	1884	.....

Name of Company.	City.	Date.	Type of Switchboard.
Western Pennsylvania Telegraph & Telephone Co.	Allegheny City, Pa.	1884	.....
Citizens Telegraph & Telephone Co.	Cleveland, Ohio.	1885	.....
The Crescent City Telephone Co.	New Orleans, La.	1885	.....
Pan Long Distance Telephone Co.	Fort Smith, Ark.	1886	.....

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(Telephone exchanges were also established and operated at Little Rock, Ark., in 1885; and at South Bend, Lockport and Elkhart, Ind., in 1887 and 1888.)

La Porte Telephone Co.	La Porte, Ind.	1892	Strowger
Bedford " "	Bedford, Ind.	1894	Utica Fire Alarm Co.
Bluffton " "	Bluffton, Ind.	1894	.....
Citizens " "	Decatur, Ind.	1894	Western Tel. Cons. Co.
Harrison " "	Toledo, Ohio.	1894	.....
Brazil " "	Brazil, Ind.	1894	Utica Fire Alarm Co.
Home " "	Clinton, Ind.	1894	.....
Citizens " "	Bloomington, Ind.	1895	Utica Fire Alarm Co.
Connersville " "	Connersville, Ind.	1895	do
Frankfort " "	Frankfort, Ind.	1895	.....
Hartford City Telephone Co.	Hartford City, Ind.	1895	Western Tel. Cons. Co.
Elkhart Telephone Co.	Elkhart, Ind.	1895	"Kokomo"

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Name of Company.	City.	Date.	Type of Switchboard.
Lafayette Harrison Telephone Co.	Lafayette, Ind.	1895	"Harrison"
Mt. Vernon Telephone Co.	Mt. Vernon, Ohio.	1895	.....
Home Telephone Co.	Chillicothe, Ohio.	1895	Western Tel. Cons. Co.
Marysville Telephone Co.	Marysville, Ohio.	1895	do
Mt. Pleasant Mutual Telephone Co.	Mt. Pleasant, Pa.	1895	Utica Fire Alarm Co.
Altoona Phoenix Telephone Co.	Altoona, Pa.	1895	Western Tel. Cons. Co.
Plymouth Telephone Co.	Argos, Ind.	1895	"Kokomo"
Home Telephone Co.	Baltimore, Md.	1896	Mason-Maxwell
Home Telephone Co.	Fort Wayne, Ind.	1896	Western Tel. Cons. Co.
Richmond Telephone Co.	Richmond, Va.	1896	Western Tel. Cons. Co.
Citizens Telephone Co.	St. Joseph, Mo.	1896	Amer. Elec. Tel. Co.
Jeffersonville Telephone Co.	Jeffersonville, Ind.	1896	.....
Citizens Telephone Co.	Grand Rapids, Mich.	1896	Amer. Elec. Tel. Co.
Franklin " "	Franklin, Ind.	1897	Springer Co.
Detroit " "	Detroit, Mich.	1897	Detroit Switchboard & Tel. Cons. Co.
Cuyahoga " "	Cleveland, Ohio.	1897	.....
Peoples " "	New Orleans, La.	1898	Detroit Switchboard & Tel. Cons. Co.
Delmarvia " "	Wilmington, Del.	1898	.....

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Name of Company.	City.	Date.	Type of Switchboard.
Kinloch Telephone Co.	St. Louis, Mo.	1898	Kellogg
Atlanta Telephone & Telegraph Co.	Atlanta, Ga.	1899	J. F. Payne & Co.
Mississippi Valley Telephone Co.	Minneapolis, Minn.	1899	Stromberg-Carlson

Prior to the year 1905 (up to which date the moving papers allege that the Bell Telephone Companies owned or controlled unexpired patents which were essential and necessary to the practical operation of *multiple* switchboards), several so-called independent telephone companies, that is to say, companies not affiliated or associated with the Bell telephone 608
companies but in competition with said Bell companies, were operating telephone exchanges equipped with *multiple* switchboards, a partial list of which companies, together with the names of the manufacturers of the switchboards used and the dates of operation, is as follows:

Name of Company.	Location of Exchange.	Name of Manufacturer of Multiple Switchboard Used.	Date.
Detroit Telephone Co.	Detroit, Mich.	Detroit Switchboard & Telephone Cons. Co.	1897
Kinloch Telephone Co.	St. Louis, Mo.	Kellogg Switch-Board & Supply Co. of Chicago.	1898
New Telephone Co.	Indianapolis, Ind.	do	1899
Maryland Telephone Co.	Baltimore, Md.	do	1900
Pittsburg & Allegheny Telephone Co.	Pittsburg, Pa.	do	1900
Cuyahoga Telephone Co.	Cleveland, Ohio.	.....	1900
Rochester Telephone Co.	Rochester, N. Y.	Stromberg-Carlson Mfg. Co.	1900
Citizens Telephone Co.	Columbus, Ohio.	Kellogg Switchboard & Supply Co. of	1900

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Name of Company.	Location of Exchange.	Name of Manufacturer of Multiple Switchboard Used.	Date.
Lackawanna Telephone Co.	Scranton, Pa.	Kellogg Switchboard & Supply Co. of Chicago.	1901
Louisville Home Telephone Co.	Louisville, Ky.	Stromberg-Carlson Mfg. Co.	1902
Home Telephone Co.	Albany, N. Y.	Kellogg Switchboard & Supply Co. of Chicago	1902
Keystone Telephone Co.	Philadelphia, Pa.	do	1902
Frontier Telephone Co.	Buffalo, N. Y.	do	1903
Commercial Union Telephone Co.	Troy N. Y.	do	1903
Kansas City Home Telephone Co.	Kansas City, Mo.	Stromberg-Carlson Mfg. Co.	1904
Consolidated Telephone Co. of Pennsylvania.	Reading, Pa.	American Elec. Tel. Co.	Prior to 1905
Consolidated Telephone Co. of Pennsylvania.	Wilkesbarre, Pa.	Kellogg Switchboard & Supply Co. of Chicago	Prior to 1905

All the above mentioned manufacturing companies which manufactured and installed the multiple switchboards for the companies specified in the foregoing list had no hesitancy in guaranteeing that their equipments would be free from patent in-

fringement and they were willing to give, and actually did give, when awarded a contract, ample bonds to indemnify the purchasing company in the event of any loss resulting from patent infringements.

I am familiar with the patents covering different features of telephone plants and am acquainted with the patent obtained by Sidney F. Shelbourne and referred to in the said affidavit of George L. Weed, verified June 27, 1910, and in the assignment annexed to the said Weed affidavit. These Shelbourne patents are as follows: 614

275,422, Apr. 10, 1883, Insulating Joint for Electric Conductors.

275,423, Apr. 10, 1883, Mold for Insulating Subterranean Electric Cables.

275,424, Apr. 10, 1883, Electric Cable.

275,425, Apr. 10, 1883, Subterranean Electric Cable.

297,175, Apr. 22, 1884, Insulated Electric Conductor or Cable.

297,176, Apr. 22, 1884, Anti-Induction Electric Conductor.

297,177, Apr. 22, 1884, Electric Cable. 615

297,178, Apr. 22, 1884, Means for Controlling and Limiting Induction.

297,179, Apr. 22, 1884, Method of and Means for Laying Subterranean Cables.

297,180, Apr. 22, 1884, Submarine Telegraph Cable.

297,181, Apr. 22, 1884, Method of and Appar. for Insulating Electric Cables.

297,182, Apr. 22, 1884, Combined Electric Light and Telegraph Post.

297,183, Apr. 22, 1884, Conduit and Attachment for Electric Conductors.

297,184, Apr. 22, 1884, Protecting Electric Conductors from Induction.

313,380, Mch 3, 1885, Electrical Conductor.

342,881, June 1, 1886, Induction Telephone Repeater.

343,676, June 15, 1886, Electric Cable.

The four patents numbers 275,422 to 275,425 inclusive, all bear the same date, viz., April 10, 1883, as above stated. The first is for an insulating compound composed of paraffin and one or
617 more of the heavier products of petroleum distillation; second for a form of underground conduit to receive melted insulating material; the third for an underground cable made up of wires supported in perforated discs, and the fourth for another variety of the same sort of cable. These four patents all expired as long ago as April 10, 1900.

The next group, numbers 297,175 to 297,184 inclusive, ten in all, also bear the same date, i. e, April 22, 1884. The first of these is for a peculiar arrangement of cable conductors; the second for a cable conductor having a conductive layer of materials wherein its insulation is an induction shield
618 (an idea long obsolete); the third for a cable in which the individual conductors are bunched in small groups twisted helically, the several groups being then also twisted with one another helically; the fourth is for an underground cable equipped with a conductor joining the induction shields of its several sections in test boxes; the fifth is for a plan of drawing cables through conduits by means of little rollers attached to them; the sixth is for a cable said to be adapted either for submarine or subterranean work having one central conductor and others arranged round it; the

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seventh for a vacuum process of filling cables with melted insulating material; the eighth for a hollow post which is to serve both as an electric lamp post and a telegraph pole; the ninth for an impractical form of conduit; and the tenth for still another form of cable emphasizing the addition of metallic screens round each insulated wire to carry off induction. These ten patents all expired nine years ago, to wit, on April 22, 1901.

The fifteenth patent, number 313,380, is for a heavy insulated wire to go underground, the claims thereof covering merely a number of unimportant 620
details. This patent expired on March 3rd, 1902.

The sixteenth patent, number 342,881, is for a peculiar way of making a repeating induction coil for telephone coils. This patent expired on June 1st, 1903.

The seventeenth and last patent, number 343,676, is for bunched cable conductors in groups of four to make each group two metallic circuits, the four wires of the group being all twisted together. This was not a bad form of cable, but if used at all, was used only in an experimental way, it being no better than many other forms of cable. Even this patent, however, is not now in 621
force, having expired on June 15th, 1903.

Neither Sidney F. Shelbourne nor the New York Electric Lines Company has done anything in the way of taking out patents for inventions since June 15th, 1886, that is twenty-four years ago, and so far as my information goes they have not now any patents at all, the seventeen referred to in the said affidavit of George L. Weed and the assignment thereto annexed which I have discussed above having all expired more than seven years ago.

None of the said seventeen patented inventions has ever gone into commercial use and although

622 they have been so long expired and have for a number of years been at the free disposal of anyone or everyone, no one has ever shown any desire to take hold of or use them. Each of said patents represents only one way of doing a certain thing, and that not by any means the best known to the telephone art.

JOHN J. CARTY.

Subscribed and sworn to before me
623 this 29th day of July 1910.

LINCOLN JONES,
Notary Public,
Kings County.
Certificate filed in New York County.

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Affidavit of Daniel J. O'Driscoll, Read in Opposition to Motion. 625

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited). 626

State of New York,
County of New York, } ss.:

I, Daniel J. O'Driscoll, being duly sworn, say: I am a stenographer by occupation, and reside at 20 Henry Street, Jersey City, in the State of New Jersey, and am over the age of thirty years.

On the 13th day of July, 1910, I went with a letter of introduction from Mr. R. W. Bainbridge, whose affidavit is hereto annexed, to the offices of the Great Eastern Telephone Company and the New York Electric Lines Company, which occupy the same suite of offices at 30 Church Street, to obtain additional information to that contained in the circular attached to Mr. Bainbridge's affidavit (which I held in my hand), and especially with reference to the New York Electric Lines Company. 627

On the upper part of the door in large letters was the name "Great Eastern Telephone Company", and in the lower part of the door in letters of about

one-quarter the size of the other were the names "State Line Telephone Company, New York Electric Lines Company, Coast Line Telephone Company, Hudson and Middlesex Telephone and Telegraph Company" grouped together.

On entering the offices I was shown into a room and was there met by a man who introduced himself as the "confidential man" of Mr. D. A. Reynolds, and I was a little while later introduced to Mr. Wayne W. Wilson as the "Secretary of the New York Electric Lines Company," no mention
629 being made of Mr. Wilson's connection with the Great Eastern Telephone Company or any of the other companies whose names were on the door. About half an hour later Mr. D. A. Reynolds, who is the President of the Great Eastern Telephone Company and claims to be the Treasurer of the New York Electric Lines Company, the relator, came in.

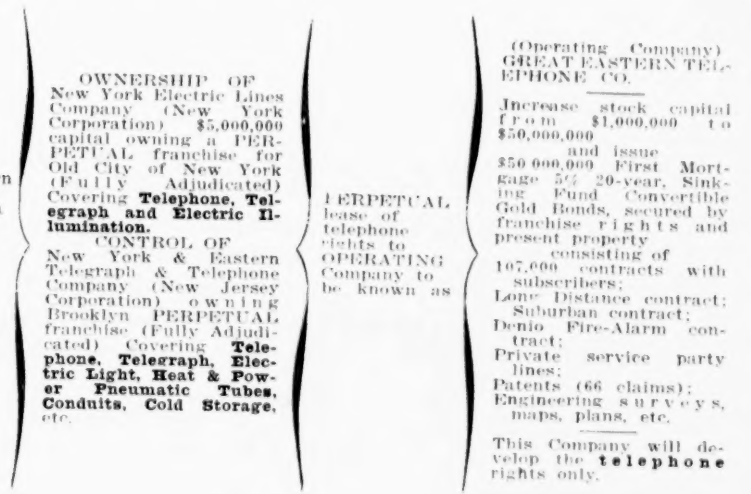
Before Mr. Reynolds came in, the "confidential man," in the presence of Mr. Wilson, told me that they had incorporated the Great Eastern Telephone Company in South Dakota to escape taxes and
630 that they had paid only eight dollars on incorporating.

Mr. Reynolds in the presence of the others named stated that the Great Eastern Telephone Company of South Dakota had been formed as a "holding company" and stated that the ownership of the New York Electric Lines Company was held by the Great Eastern Telephone Company of South Dakota; that the Great Eastern Telephone Company of New York was going to be the "operating company," but that at the present time the New York corporation had no property and had issued only qualifying stock to qualify its directors to

vote; that the Great Eastern Telephone Company of South Dakota would pay all the bills and debts of the Great Eastern Telephone Company of New York so that the latter company, the operating company, would start "with not a single debt when they do start"; that the Great Eastern Telephone Company of New York has no property and needs no property as everything is owned by the Great Eastern Telephone Company of South Dakota which would furnish everything.

I stated to Mr. Reynolds, in the presence of the others named, that from the standopint of an investor, I could not quite understand the arrangement of the three companies as he had given it to me, as above stated, whereupon the "confidential man" said to Mr. Reynolds, "You had better show him that diagram of yours." Mr Reynolds then opened a drawer in the desk at which he was sitting and took out a paper which he handed to me, which paper reads as follows:

DIAGRAM OF FINANCIAL PLAN.


Great Eastern of South Dakota as a HOLDING or Pioneer Company has acquired.
OWNERSHIP OF New York Electric Lines Company (New York Corporation) $5,000,000 capital owning a PERPETUAL franchise for Old City of New York (Fully Adjudicated) Covering Telephone, Telegraph and Electric Illumination.
CONTROL OF New York & Eastern Telegraph & Telephone Company (New Jersey Corporation) owning Brooklyn PERPETUAL franchise (Fully Adjudicated) Covering Telephone, Telegraph, Electric Light, Heat & Power Pneumatic Tubes, Conduits, Cold Storage, etc.
PERPETUAL lease of telephone rights to OPERATING Company to be known as
(Operating Company) GREAT EASTERN TELEPHONE CO.
Increase stock capital from $1,000,000 to $50,000,000
and issue $50,000,000 First Mortgage 5% 20-year, Sinking Fund Convertible Gold Bonds, secured by franchise rights and present property
consisting of 107,000 contracts with subscribers;
Long Distance contract;
Suburban contract;
Denio Fire-Alarm contract;
Private service party lines;
Patents (66 claims);
Engineering surveys, maps, plans, etc.
This Company will develop the telephone rights only.

634 The original of this paper is annexed to this affidavit and marked Exhibit AA.

Mr. Reynolds then said, with the paper before him, "You see what this means, the property of the Great Eastern Telephone Company of South Dakota consists of the ownership of the New York Electric Lines Company and the control of the New York and Eastern Telegraph and Telephone Company, and it has given a perpetual lease of the telephone rights to the operating company known as the Great Eastern Telephone Company of New
635 York."

After glancing over the paper I asked to see the "perpetual lease" mentioned in it, to which Mr. Reynolds replied that he could not show me the lease until I became a stockholder.

Mr. Wilson stated, in the presence of the others named, that if I wanted to take $30,000 or $40,000 of the stock, I could get it, but that they thought that the $20 per share stock mentioned in the circular (annexed to Mr. Bainbridge's affidavit) which I held in my hand, was all gone. I had not indicated on my part or on the part of Mr. Bainbridge, a desire to subscribe for any stated amount
636 of that stock up to that time. The figures of the $30,000 or $40,000 was the voluntary suggestion of Mr. Wilson and the "confidential man," speaking back and forth. No one said anything for a minute or two, whereupon the "confidential man" turned around in his chair and speaking in the presence of Mr. Wilson said, "Hold on, perhaps we can give you some of the $20 per share stock." The "confidential man" stated further in the presence of Mr. Wilson, "We want the money now to build a first exchange, and until we get that money we

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can't build it, as the Great Eastern Telephone Company of New York has no money."

I said that I would like to have a little of the financial history of the company. The "confidential man" said, in the presence of Mr. Wilson, "We had a party of financiers come on from St. Louis some time ago who were about to finance the deal, but just when we thought we had the money, one or two of the parties backed off and the deal was off." He said further that on another occasion, "There was another Western crowd who came to New York and put up some fifty or sixty thousand 638
dollars, several certified checks were laid on the table, one man saying 'here is my share,' another saying the same thing, and when it came to the fourth man the thing blew up again. This time we were jubilant, for we left our office prepared to get the money and went over to an office on Broadway and when we did not get it we returned discouraged." He said further, "There was a broker in Wall Street, you would know him if I mentioned his name, who was going to put up $100,000 to finance the deal, but when it came to a show down all he could put up was $12,000." The "confiden- 639
tial man" stated further, in the presence of Mr. Wilson, "the Bidwell Jackson combine had an option to purchase all the stock of the New York Electric Lines, but it did not go through." He also stated, "the Hubbell Company of Buffalo was about to finance the deal at another time, if the Electric Lines Company got a workable decision."

I said, "I would like some information about the subscribers mentioned in the circular," which I held in my hand and which is annexed to Mr. Bainbridge's affidavit.

Mr. Wilson stated that the contracts were procured in 1906-07, by agents of the company who in

turn paid a commission to every subscriber who secured another. "For instance," he said, "we would get a contract signed by a grocer and he would in turn, to earn a commission, canvass the block and get others. No money was paid into the company on the contracts; they were to run from the date of installation of the apparatus and in the meantime no one was bound." I replied I would like to see one of the subscribers' contracts, whereupon Mr. Wilson stated to the "confidential man," "Show him the ledger." The "confidential man" then went out and brought in a big book in which a number of names and addresses were entered and opened one or two pages of it for me. Mr. Reynolds said, "I regard the percentage of subscribers who had signed the contracts as about 75% good, some had died and some had moved away." The "confidential man" said, "Some of the contracts came in which we did not think were genuine, and we sent two men out to verify them and they reported that some of the signatures were not genuine."

I asked whether they had any terminal facilities, to which the "confidential man" said "No," and I then asked whether they had any telephones in operation, to which he replied "No."

I said, "The New York Electric Lines Company has its office here, hasn't it?" to which the "confidential man" with a wave of the hand toward Mr. Wilson said, "Yes, Mr. Wilson is the Secretary, but the New York Electric Lines Company is carrying on business in the name of the Great Eastern of New York."

I told the three gentlemen that I did not see just what they had to offer, but that Mr. Reynolds had better write a letter to Mr. Bainbridge to show

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him whether their stock was a good investment. Mr. Reynolds said he would do so, and since then I have seen his letter, written the day after my call, which is annexed to Mr. Bainbridge's affidavit.

In connection with my investigation I ascertained that the Great Eastern Telephone Company is circulating a pamphlet consisting of four pages of the size of a newspaper, headed as follows:

"GREAT EASTERN TELEPHONE COMPANY

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CAPITAL STOCK $30,000,000
$15,000,000 Preferred 6 Per Cent Cumulative Dividends
$15,000,000 Common Stock

$3,000,000 Guaranteed

The GREAT EASTERN TELEPHONE COMPANY has over 65,000 verified contracts (many for five years) guaranteeing over $3,000,000 net annual earnings, and is adding a thousand new contracts a day. This is 10% on its entire capital stock, or 6% on the Preferred and 14% on the Common Stock. We will double this by May 1. What better guaranteed investment can be had than that furnished by 65,000 business men?

645

DON'T GO TO COLORADO.

Don't go to Colorado and sink your money in mining when you can invest in a "gold mine" right here in the City of New York, where you can watch your property every day and know the men who are handling your

money. THE GREAT EASTERN TELEPHONE COMPANY has over $3,000,000 of net earnings (verified contracts) 'blocked out,' and it will have over $5,000,000 before May 1. Nothing but downright dishonesty can cause you to lose your money, and you can easily find out whether the management is honest or not. Why not look them up?"

After my call, I looked into the Bidwell-Jackson option and annex hereto copies of the papers relating thereto, marked Exhibit BB.

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Since my interview above mentioned, I have ascertained that in 1905 the Great Eastern Telephone Company issued a circular inviting subscriptions to its stock, a copy of which is part of the record on application heard before Mr. Justice Bischoff and reported 51 Misc., 413; 115 App. Div., 254; 188 N. Y., 523. A copy of that circular, taken from that record, is hereto annexed, marked Exhibit CC. Notwithstanding the alluring wording of that circular and the lapse of five years, the said Great Eastern Telephone Company has been unable to finance the scheme as appears from the facts hereinbefore stated.

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Later I visited several of the addresses mentioned in the ledgers which they showed me and upon diligent inquiry I found at those places no one who knew anything about the Great Eastern Telephone Company and no one ever entered into a contract with it for telephone service.

DANIEL J. O'DRISCOLL.

Sworn to before me this 2nd
day of August, 1910.

HERBERT L. SEWARD,
Notary Public,
Kings Co.
Certificate filed in New York Co.

Exhibit AA, Annexed to Affidavit of D. J. O'Driscoll, Read in Opposition to Motion.

DIAGRAM OF FINANCIAL PLAN.

Great Eastern of South Dakota as a HOLDING or Pioneer Company has acquired.

OWNERSHIP OF New York Electric Lines Company (New York Corporation) $5,000,000 capital owning a PERPETUAL franchise for Old City of New York (Fully Adjudicated) Covering **Telephone, Telegraph and Electric Illumination.**

CONTROL OF New York & Eastern Telegraph & Telephone Company (New Jersey Corporation) owning Brooklyn PERPETUAL franchise (Fully Adjudicated) Covering **Telephone, Telegraph, Electric Light, Heat & Power, Pneumatic Tubes, Conduits, Cold Storage,** etc.

PERPETUAL lease of telephone rights to OPERATING Company to be known as

(Operating Company) GREAT EASTERN TELEPHONE CO. (New York Corporation)

Increase stock capital from $1,000,000 to $50,000,000 and issue $50,000,000 First Mortgage 5% 20-year, Sinking Fund Convertible Gold Bonds, secured by franchise rights and present property consisting of
107,000 contracts with subscribers;
Long Distance contract;
Suburban contract;
Denio Fire-Alarm contract;
Private service party lines;
Patents (66 claims);
Engineering surveys, maps, plans, etc.

This Company will develop the **telephone** rights only.

Exhibit CC, Annexed to Affidavit of D. J. O'Driscoll, Read in Opposition to Motion.

GREAT EASTERN TELEPHONE COMPANY

Offers 50,000 Shares of Its Preferred 6% Cumulative. Dividend Stock at par, with 50% Common Stock Bonus.

This Company has been organized as a PARENT OR HOLDING company for the purpose of acquiring a number of properties and franchises necessary for the establishment of a modern telephone sys-

tem in the City of New York, with a present capacity of 300,000 telephones and an ultimate capacity of 600,000 telephones, at prices for service ranging from one-half to three-fourths present rates, and has already secured the following rights and properties:

1. A 99-year contract with the INTER-OCEAN TELEPHONE AND TELEGRAPH COMPANY for itself and sixty associate Independent telephone companies controlling the long-distance telephone business of over 10,000 cities and villages in New York, New Jersey, Pennsylvania and the West, which will be immediately extended to include all Independent telephone companies, operating fully 2,500,000 telephones, all of which will be tributary to the New York City system.

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2. The controlling interest in a large manufacturing plant to be located in or near New York City ($400,000 of the stock of which has been underwritten at par), sufficient to supply the requirements of this Company and its associate companies, the instruments being the same as those employed by the FRONTIER TELEPHONE COMPANY in its large and successful telephone system in Buffalo, New York. This factory will have a capacity of over 12,000 telephones per month, beside the switchboard equipment necessary for operating the same.

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3. The exclusive right for New York City, *without royalty*, of the REYNOLDS MULTIPLEX TELEPHONE SYSTEM, secured by four broad patents, by means of which eight (8) telephones may be operated on one pair of wires with *absolute secrecy*.

This system reduces the cost of line construction to nearly one-eighth the usual cost, and is the only party-line system in existence giving *secret* service.

4. The control of the NEW YORK & EASTERN TELEGRAPH and TELEPHONE COMPANY, including the only *perpetual conduit and telephone franchise* ever granted by the former City of Brooklyn. (See appendix A.) This franchise has been fully adjudicated and sustained through all courts of the State of New York, the decision in the highest court being unanimous in its favor. That Company also acquired other valuable rights from the former City of Brooklyn that now become the property of the GREAT EASTERN TELEPHONE COMPANY. 656

5. The control of the NEW YORK ELECTRIC LINES COMPANY, to which was granted by the old City of New York the *only subway or conduit franchise* not owned by the Consolidated and Empire City subway companies (see appendix B). This franchise is also *perpetual* and will enable this Company to build its own conduits in the Boroughs of Manhattan and The Bronx, should present conduit facilities prove inadequate. This franchise, like the one granted in Brooklyn, is not merely a "permit" to occupy existing subways, but a *vested right* to *build* subways, as will be shown by a perusal of the same. 657

6. The ENTIRE capital stock of a New York corporation of $1,000,000, of the same name, organized under the Telephone Law of the State, which will constitute a *construction* and *operating* company, thus securing to the stockholders of the par-

658 *Exhibit CC, Annexed to Affidavit of O'Driscoll.*

ent or holding company ALL the profits of construction as well as operation.

7. Advance orders for telephone service amounting to over $1,500,000 as the result of five weeks' canvass, and is now booking advance business at the rate of over $400,000 a week. At the present rate the Company will have over 200,000 subscribers in New York City before the close of the preliminary canvass. These orders, while below present rates, are sufficient to earn 6% on the Pre-
659 ferred Stock and over 15% on an equal amount of Common Stock.

This Company is also closely affiliated with the COAST LINE TELEPHONE COMPANY, now developing Jersey City, Newark, Hoboken, Bayonne, the Oranges and other adjacent cities in New Jersey; and with the STATE LINE TELEPHONE COMPANY, whose lines connect with over sixty other systems, embracing over 200,000 Independent telephones, and now rapidly extending into Westchester, Putnam and Dutchess Counties, north of this City. These three companies occupy the Metropolitan District, conceded to be the richest telephone field
660 in the world.

Charters, franchises, contracts and assignments have been passed upon by CHARLES W. DAYTON, General Counsel and J. ASPINWALL HODGE, Associate Counsel. The patents and assignments by CHAPIN, HAYWOOD & MARBLE, and the franchises respectively by ERASTUS H. BENN, ANDREW DUTCHER, FRANK B. VERMILYA; ALEXANDER & GREEN, JONES & MCCORMICK and W. B. BURNETT.

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MAJORITY OF STOCK TRUSTEED.

Of the 300,000 shares of the capital stock of the GREAT EASTERN TELEPHONE COMPANY, 260,000 shares have been subscribed or are contracted to be issued. Of this amount, 195,000 shares will be deposited under a voting trust agreement for a period of five years, and Voting Trust Certificates issued therefor, thus insuring the carrying out of the policy of the Company and effectually preventing its absorption by competitive interests. The NEW YORK TRUST COMPANY is the 662
Voting Trust Depository, and D. A. REYNOLDS, and J. VAN VECHTEN OLCOTT, of New York, and GEORGE C. EDWARDS, of Bridgeport, Connecticut, have been duly elected Voting Trustees under said agreement. All stock, under charter provisions, has cumulative voting power (minority representation), and no mortgage can be placed upon the property and franchise of the Company without a two-thirds vote of all stock outstanding.

CHARTER AND OFFICERS.

The charter under which the Company will operate is one of the broadest ever granted by the 663
State of New York, providing for "constructing, owning, using and maintaining a line or lines of electric telephone, telegraph, telautograph, messenger call service, stock quotations and other methods of communication through the agency of electricity."

The Board of Directors, whose commerical associations are enumerated on the back of the subscription blank, is composed of the following gentlemen, many of whom are interested in other tele-

phone enterprises: W. C. ADAMS, GEORGE R. BIDWELL, STEPHEN M. CONGER, GEORGE C. EDWARDS, GEORGE V. HAGERTY, GUSTAV LEMBECK, J. F. O. MEYER, EDWIN M. MILLARD, J. VAN VECHTEN OLCOTT, D. A. REYNOLDS, W. MYRON REYNOLDS, DAVID B. SICKELS, WILLIAM H. STAYTON, D. J. TINGLEY and EDWARD G. WARD.

TERMS OF SUBSCRIPTION.

665 For each one thousand ($1,000) dollars subscribed, the subscriber will receive ten (10) shares of Preferred six (6%) per cent. cumulative dividend Stock, and a Voting Trust Certificate representing five shares of the Common Stock, par value one hundred ($100) dollars per share. Larger or smaller amounts will be received in the same proportion, but no Voting Trust Certificate will be issued for less than one share, of a par value of one hundred ($100) dollars.

666 Payments on subscriptions may be made as follows: Ten per cent. ($10.00 per share) of the amount subscribed for to accompany the application, and the balance in nine equal monthly payments (from date of subscription) of $10 per share, with an option to the subscriber to pay the entire balance upon allotment, receiving six (6%) per cent. per annum discount for anticipated payments. Receipts will be given for payments as made, and certificates (which are entitled to dividens from date of issue) will be issued upon final payment. The right is reserved to close the subscription at any time without notice, and to reject any subscription and to allot smaller amounts than applied for. All subscriptions must be made on the enclosed form, and must be accompanied by a

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payment of 10% of the amount subscribed for as above indicated. If no allotment is made, payments will be returned in full, and if only a portion of the amount applied for be alotted the balance of initial payments will be applied towards the final payment. If any further balance remains, such balance will be returned. In case any subscriber shall fail to make any of the payments provided for by his subscription, after 30 days' notice,

the amount of his initial payment, or such payments as he shall have made prior to such notice, 668
will be retained and the subscription treated as provided for under New York Statutes.

Remittances may be made to this Company direct, or to the NEW YORK TRUST COMPANY, 26 Broad Street, for the account of the GREAT EASTERN TELEPHONE COMPANY, where desired, and the same will receive as prompt attention as if sent direct to the Company's office.

Very respectfully,

GREAT EASTERN TELEPHONE COMPANY.

669

32 Broadway, New York City.

SUBWAY FRANCHISE, BOROUGH OF BROOKLYN—EX. A. GRANTED IN 1894.

RESOLVED, that the assent of the Corporation of the City of Brooklyn, State of New York, be and the same is hereby given to the New York and Eastern Telegraph and Telephone Company,

a corporation duly organized under the Laws of the State of New Jersey, certificates of such incorporation being duly filed with the Secretary of the State of New York on March 27, 1894, to its successors, lessees and assigns, to establish and maintain a SYSTEM OR SYSTEMS OF TELEGRAPHING AND TELEPHONING, and other METHODS OF TRANSMISSION BY SOUND, AIR OR ELECTRICITY, for public and private use THROUGHOUT the City of Brooklyn, and for these purposes to OPEN STREETS, AVENUES, ROADS, LANES, HIGHWAYS and PUBLIC PLACE IN SAID CITY, for the PLACING OF CONDUITS, TUBES, WIRES, CONDUCTORS, CABLES, INSULATORS and all necessary appliances for the business and object of providing means for communication between buildings, structures and edifices, public or private, and for such purposes as shall be connected with and necessary to the successful conduct of the business proposed by this Company, provided all wires shall be underground except as otherwise permitted by the Subway Commission.

PROVIDED, That the position and depth of said wires in the several streets, avenues, roads lanes, highways and public places of the City shall be determined and established by the Commissioner of the City Works, and when once placed the position of these wires shall not be changed except by his consent, first had and obtained.

PROVIDED, That an accurate map be procured at the expense of the New York and Eastern Telegraph and Telephone Company, showing the position of all conduits, tubes and wires, laid by said Company, their branches and detours, and all extensions wherever made up to the first day of Jan-

uary of each year, shall be filed with the Commissioner of the Department of City Works on or before the fifteenth day of January of each year, and the New York and Eastern Telegraph and Telephone Company shall at its own expense restore, keep and maintain in good repair for the period of one year after the completion of such work, such part of the streets, avenues, lanes, highways, roads, and public places over and above where they shall have been opened for the construction of conduits or the laying of wires or tubes by said Company, and at a grade to conform with the grade of the 674
street or to such a grade as the Commissioners of the Department of City Works may establish.

PROVIDED, That the Commissioner of the Department of City Works shall appoint such inspectors as he may deem necessary for the supervision of the work proposed by the said Company as far as it relates to the opening or repaving of the streets, placing of poles, etc., and that the cost of such inspection and supervision shall be paid monthly by the New York and Eastern Telegraph and Telephone Company to the Treasurer of the City of Brooklyn, the amount to be determined 675
by the Commissioner of the Department of City Works.

PROVIDED, That the said New York and Eastern Telegraph and Telephone Company, its successors or assigns, shall, beginning with January 1st, 1895, and every six months thereafter, pay to the Treasurer of the City of Brooklyn one per cent. on the gross receipt of revenues derived from whatsoever source for six months preceding, and for the purpose of determining such receipts, all the books, papers, etc., of the New York and Eastern Tele-

676 *Exhibit CC, Annexed to Affidavit of O'Driscoll.*

graph and Telephone Company shall be open for inspection and examination by the City authorities.

PROVIDED, That the said New York and Eastern Telegraph and Telephone Company, its successors and assigns, shall permit the City of Brooklyn to place the electrical wires of the Fire and Police departments in its conduits, tubes or other underground channels without the charge to the City or either of said departments.

677 PROVIDED, That the New York and Eastern Telegraph and Telephone Company shall furnish to the City of Brooklyn for local uses telephonic service at a price not exceeding forty dollars per annum for each instrument used, and the price for local uses to the general public shall not exceed seventy-five dollars per annum for each instrument used.

PROVIDED, That some portion of the work shall be completed by January 1st, 1895, and wires and instruments shall be in place for service.

678 PROVIDED, That the New York and Eastern Telegraph and Telephone Company shall before beginning the construction of its lines by opening any street, road, lane, avenue, highway, or public places of the City as herein authorized, furnish to the City of Brooklyn a bond with such sureties as shall be approved by the Mayor of the City, and for such reasonable amount as he may determine, that it will faithfully carry out the objects proposed in these resolutions and hold the City of Brooklyn harmless from any cause of actions resulting from negligence in its construction or in the operation of its lines.

SUBWAY FRANCHISE, BOROUGHS OF MANHATTAN AND BRONX—EX. B. GRANTED IN 1883.

RESOLVED, that permission be and hereby is granted to the New York Electric Lines Company, TO LAY WIRES OR OTHER CONDUCTORS OF ELECTRICITY IN AND THROUGH THE STREETS, AVENUES AND HIGHWAYS OF NEW YORK CITY and to make connections of such wires or conductors UNDERGROUND BY MEANS OF THE NECESSARY VAULTS, TEST BOXES AND DISTRIBUTING CONDUITS, and thence above ground with points of ELECTRIC ILLUMINATIONS or of TELEGRAPHIC OR TELEPHONIC SIGNALS in accordance with the provisions of an "Ordinance to Regulate the Laying of Subterranean Telegraph Wires and Electric Conductors in the Streets of the City" passed by the Common Council and approved by the Mayor December 14, 1878, provided however, and it is hereby ordained, and

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RESOLVED, That whenever the said New York Electric Lines Company, in the progress of laying its lines of Electric conductors, shall be prevented or obstructed from placing its wires in the spaces which may have been generally selected under the ordinance passed and approved as aforesaid, by manholes or sewer, gas, steam or water mains or other underground or pavement impediments, now and heretofore existing, then and IN SUCH CASES the said Company may, UNDER THE PRIVILEGES HEREBY GRANTED, VARY THE SPACE SELECTED by adopting appropriating and using equivalent and nearest practicable spaces as may be found necessary and provided further, and it is hereby further

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RESOLVED and ordained, that the connection vaults aforementioned may be extended under-

ground no more than four feet in depth or two feet in any lateral direction beyond the limited spaces contemplated for the lines of wires in the ordinance passed and approved as aforesaid and may be fitted with covers or other means of access at the level of the pavements of the several streets and avenues.

RESOLVED, that in addition to the requirements and provisions to be observed contained in the said ordinance, the said New York Electric
683 Lines Company, as a further compensation for the opening and use of the streets of the City, shall pay into the City Treasury, within ten days after taking up the pavements, for each one thousand feet in length of trench, to be excavated, the maximum sum or sums of money which have been, or which may hereafter be required of grantees, or licenses to be paid under any general or special Ordinance of the Common Council heretofore enacted, authorizing the laying of Electric Conductors under the Streets of the City.

RESOLVED, that the permission of the said New
684 York Electric Lines Company hereby intended by the Common Council is conditioned that the said Company shall not transfer or dispose of the franchise hereby granted without the further authority of the Common Council, and that it will make no discrimination of individuals or corporations in the rental and use of its lines or wires which may be laid down hereunder.

RESOLVED, That the City shall have the option, after the first day of January, 1885, to require the said New York Electric Lines Company to pay

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into the City Treasury two per cent. of its gross receipts derived from the rental of its wires under the franchise hereby granted in lieu of the donation to the City of the two wires in each line of conductors, as provided in the General Ordinance passed and approved as aforesaid, and said option may be declared at any time after the said first day of January, 1885, by resolution of the Common Council.

Exhibit BB, Attached to Affidavit of D. J. O'Driscoll, Read in Opposition to Motion.

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THIS AGREEMENT, made the twenty-fourth day of January, 1903, by and between WAYNE W. WILSON and the other stockholders of the NEW YORK ELECTRIC LINES COMPANY who shall become parties to this agreement (hereinafter called the "Vendors"), parties of the first part, and CALEB H. JACKSON and GEORGE R. BIDWELL, of New York City (hereinafter called the "Purchasers"), parties of the second part, WITNESSETH:

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WHEREAS: The Vendors are the owners and holders of the number of shares of the capital stock of the New York Electric Lines Company, a corporation of the State of New York set opposite their respective signatures hereto, each of the par value of $100.00, the total authorized capital stock of which corporation is $5,000,000; and

WHEREAS: the Purchasers are desirous of obtaining an option to purchase all of the shares of

the capital stock of said New York Electric Lines Company, and are willing to pay the sum of twenty cents (20c.) per share for such option, which payment is to be a part of and to be credited upon the total purchase price, in case said option shall be exercised as herein provided:

NOW, THEREFORE, in consideration of the premises and of the sum of One Dollar by each of the parties to the others in hand paid, the receipt whereof is hereby acknowledged, and of the agree-
689 ments herein contained, the parties hereto hereby agree as follows:

FIRST.—The Purchasers agree to deposit in the Hamilton Trust Company in the Borough of Brooklyn, in the City of New York, on or before the First day of February, 1903, the sum of Ten Thousand ($10,000) Dollars with instructions to said Trust Company to pay the same to the Vendors as hereinafter provided.

SECOND.—The Vendors severally agree to deposit with said Hamilton Trust Company certificates
690 duly endorsed for transfer in blank for the number of shares of the capital stock of the New York Electric Lines Company set opposite their respective signatures hereto, with instructions to said Trust Company to deliver the same to the Purchasers or to the survivor of them or to their or his nominee or assigns as hereinafter provided in article Third thereof.

THIRD.—It is mutually covenanted and agreed as follows:

Said sum of Ten Thousand ($10,000) Dollars shall be deposited by the Purchasers with the Ham-

ilton Trust Company with instructions to pay over the same to the depositing vendors as soon as the Vendors holding and owning forty-seven thousand six hundred (47,600) shares of said stock shall have become parties hereto and deposited the certificate for said shares as herein agreed upon, at the rate of Twenty Cents (20c.) for each share of stock so deposited, provided, however, that at least forty-seven thousand six hundred (47,600) shares of said shares shall have been so deposited under this agreement on or before the First day of July, 1903. 692

Said Ten Thousand ($10,000) Dollars will be so deposited with the further instructions to said Trust Company to repay the same to the Purchasers if at least forty-seven thousand six hundred (47,600) shares shall not have been so deposited hereunder on or before the First day of July, 1903, and with further instructions to receive upon deposit under this agreement such further shares of said stock in addition to said forty-seven thousand six hundred (47,600) shares as may be tendered by the owners thereof for deposit on or before the Twenty-fourth day of January, 1904, and to pay 693 to such additional depositors also the sum of Twenty cents (20c.) per share for such shares of stock so deposited, and to hold the balance of said Ten Thousand ($10,000) Dollars not so applied by the said Trust Company to the order of the Purchasers or the survivor of them, or of their or his nominee or assigns.

The Vendors on their part further severally agree to deposit certificates for their said shares of stock with said Hamilton Trust Company under this agreement on or before the First day of July, 1903, each duly endorsed for transfer in blank,

with instructions to said Trust Company to deliver the same to the Purchasers or to the survivor of them or to their or his nominee or assigns whenever there shall have been paid to said Trust Company under this agreement a sum of money which, added to the Twenty cents (20c) per share above provided for will suffice to pay to the depositors hereunder the sum of Ten ($10.00) Dollars per share for each share of the stock so deposited, provided, however, that said payment shall have been completed within two years from the date of this
695 agreement, but to return said deposited certificates to the Vendors free from all charges whatsoever in the event that payment shall not have been so made within said two years.

FOURTH.—The Vendors further severally covenant and agree each for himself and herself that they are respectively the absolute unconditional owners of all of the said shares of stock set opposite their respective signatures hereto, and that no other person or corporation has any rights therein nor lien thereon.

696 FIFTH.—The Vendors further severally agree that upon the demand of the Purchasers or of the survivors of them or of their or his nominee or assigns made at any time after the deposit with said Trust Company of the total purchase price for said shares of stock, as hereinafter provided, they, the Vendors, will procure the resignations of such officers and directors of said New York Electric Lines Company and procure the election in their stead of such officers and directors of said Company as shall be designated by the Purchasers, or the survivor of them, or by their or his nominee or assigns.

And the Vendors further severally agree that upon the demand of the Purchasers, or of the survivor of them, or of their or his nominee or assigns, made at any time after the deposit of said Twenty cents (20c.) per share as herein provided, they, the Vendors, will procure the resignations of three of the present directors of said New York Electric Lines Company and the election in the place of the directors so resigning of three directors designated by the said Purchasers or the survivor of them or by their or his nominee or assigns, also that after said deposit of Twenty cents (20c.) per share, and 698 during the two years term of this agreement, and upon like demand they will at any time and from time to time cause to be duly called and held regular or special meetings of the directors of said New York Electric Lines Company, and upon like demand will cause to be passed at any of said meetings such appropriate resolutions as may be requested in writing by the said Purchasers or the survivor of them or their or his nominee or assigns for the furtherance of the interest and plans of said Company, provided, however, that if any resolution so proposed or requested shall in any manner 699 jeopardize the rights, privileges or franchises of said New York Electric Lines Company the Vendors may refuse to procure the passage of such resolution.

SIXTH.—The Vendors severally each for himself and herself agree with the Purchasers to sell to the Purchasers or to their nominee or assigns, or to the nominee or assigns of the survivor of them, all of the shares of stock of the New York Electric Lines Company set opposite their respective signatures of the said Vendors hereto at the price of

Ten ($10.00) Dollars per share, provided said price shall have been deposited with said Hamilton Trust Company as herein agreed upon within two years from the date of this agreement, and if said sale shall be so completed to accept the Twenty cents (20c.) per share herein referred to and give credit for the same as a payment on account of said Ten ($10.00) Dollars per share.

SEVENTH.—The Purchasers covenant and agree to save and hold free and harmless the New York
701 Electric Lines Company and its stockholders, officers and directors from any expense or charge whatsoever in and about the conduct of the business of said Company, resulting from action so taken at the request of the Purchasers during the entire term of the continuance of this option, to wit: two years from the date hereof, and the said Purchasers further covenant that they will pay or cause to be paid all taxes, assessments and charges of every kind and nature whether state, county or municipal, or for work, labor or services rendered, or material furnished which may be levied upon or
702 become charges against the said New York Electric Lines Company during the entire term of the continuance of this action.

It being the intention of the parties hereto that said purchasers shall bear every expense which might in any manner be a charge against said Company during the term of this option, except such expense which may result from action of said company taken without the consent of the purchasers.

EIGHTH.—The Purchasers further agree to bear all and every charge, expense, fee or commission of said Hamilton Trust Company for its services

herein, and to pay all said charges, expenses, fees or commission whenever the same may become due and payable whether the option hereinbefore granted be or be not exercised.

NINTH.—The Vendors further severally agree that the Board of Directors and stockholders of the said New York Electric Lines Company will not take any action except at the request of the said Purchasers which shall be out of the ordinary course of business or which shall in any way impair the rights, privileges and franchises of said 704 company.

TENTH.—The said Wayne W. Wilson and the other Vendors further specially and severally agree to use their best efforts to procure the deposit hereunder of certificates representing the entire capital stock of said New York Electric Lines Company, in consideration whereof the Purchasers agree that, if they exercise this option, they will purchase all the shares of stock deposited hereunder within said two years at said price of Ten ($10.00) Dollars per share.

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IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first herein written.

CALEB H. JACKSON.
GEORGE R. BIDWELL.

706. *Exhibit BB, Annexed to Affidavit of O'Driscoll.*

	Names	No. of Shares.	
	George L. Weed	Three hundred & Seventeen	317
	Wayne W. Wilson	Two Thousand & Fifty	2050
	Irene L. Weed	Five Hundred	500
	Ethel G. Weed	Five Hundred	500
	Charles J. Warren	One Thousand and One	1001
	Louis Wernberg	One Hundred	100
	Herman G. Loew	Thirteen Hundred & Seventy-five	1375
	Bainbridge Hinkley	Seventy-one	71
	Johnson S. Cary	Seventy-five	75
	Edward Barr	One Hundred & One	101
707	William F. Wagner	Twenty-five	25
	S. B. Dutcher	Five	5
	George L. Weed	Twenty-five	25
	Jesse Larrabee	Four Hundred	400
	E. H. Benn	Fifteen	15
	Seigel Bernhard	One Hundred	100
	H. A. Gildersleeve	Eleven Hundred & Twenty-five	1125
	James S. White	Fifty	50
	Elizabeth S. White	Four Hundred and Fifty	450
	Marie R. Weed	Twelve Thousand	12000
	Geo. M. Riley	Twenty-seven Thousand Five Hundred and Sixty	27560
708	M. Jennie Riley, George M. Riley, Administrator	Fifty	50
	Estate Chas. Riley, Deceased	One Thousand	1000
	Jerry A. Wernberg	One Hundred	100
	Agnes Riley	Seventy	70
	Margaret A. Riley	Seventy	70
	M. T. Riley	Fifty	50
	George L. Weed	Two Hundred	200
	Fred. Davis	One Hundred	100
	R. Montgomery Schell	Three Hundred	300
	F. C. Elliott	Fifty	50
	Wayne W. Wilson	Twenty-five	25
	"	Twenty-five	25
	John A. Seely,		

I HEREBY CERTIFY that the foregoing is a true and correct copy, and that the original thereof is now in file in the Hamilton Trust Company of Brooklyn, N. Y.

WAYNE W. WILSON,
Secretary,
New York Electric Lines Company.

MEMORANDUM OF AGREEMENT, made this 710
21st day of November, One thousand nine hundred and three, by and between WAYNE W. WILSON and the other stockholders of the NEW YORK ELECTRIC LINES COMPANY, who shall become parties to this agreement, hereinafter called the Vendors, parties of the first part, and CALEB H. JACKSON and GEORGE R. BIDWELL, of the City of New York, hereinafter called the Purchasers, parties of the second part:

WHEREAS, on the 24th day of January, 1903, the parties hereto entered into a certain agreement concerning the purchase of stock of the said New 711
York Electric Lines Company, in and by which agreement the Purchasers were granted an option to purchase said stock, which will expire on the 24th day of January, 1905; and

WHEREAS, it may be desirable that said option shall be extended until the 24th day of January, 1905,

NOW, THEREFORE, in consideration of the premises and of the sum of One Dollar by each of the parties to the other in hand paid, the receipt

712 *Exhibit BB, Annexed to Affidavit of O'Driscoll.*

whereof is hereby acknowledged, the parties hereby agree as follows:

FIRST.—The Purchasers are hereby granted an extension of said option for a period of one year from the expiring date thereof, provided that on or before the 1st day of November, 1904, the said Purchasers shall have deposited in the Hamilton Trust Company, in the Borough of Brooklyn, the sum of Five thousand dollars ($5,000) to be applied upon the purchase price with instructions to said Trust
713 Company to pay the same to the Vendors pro rata immediately upon the deposit of said $5,000 in said Trust Company in the same manner as provided in said agreement bearing date January 24th, 1903;

SECOND.—In the event that the said Purchasers do not deposit the sum of Five Thousand ($5,000) Dollars at the time and in the manner aforesaid, then this extension of said option shall be null and void and of no effect, but it is expressly covenanted and agreed that the said agreement, bearing date the 24th day of January, 1903, shall remain in full force and effect as if this agreement had not been
714 executed.

In consideration of the payment of four hundred sixteen dollars and sixty-seven cents ($416.67), on or before the 25th day of January, 1905, and of each and every month for the twelve months next ensuing, the foregoing contract is hereby extended for the term of twelve months from this date. But should any payment not be made when due then this contract and the extension thereof is to be void and of no effect. These monthly payments are to be instead of the five thousand dollars ($5,000) to have been paid as provided in the original con-

tract, and to be distributed by the Trust Company pro rata as therein provided.

Dated this 24th day of January, 1905.

CALEB H. JACKSON.
GEORGE R. BIDWELL.

Names	No. of shares	
Wayne W. Wilson	2050	
Chas. J. Warren	1001	
Frederick B. Davis	100	716
Herman G. Loew	1375	
Jesse Larrabee	400	
Ethel G. Weed	500	
Irene S. Weed	500	
Marie R. Weed	12000	
F. C. Elliott	50	
R. Montgomery Schell	300	
C. S. Jackson	5	
B. Hinkley	71	
Agnes Riley		
By Jerry A. Wernberg		
her attorney	76	
Margaret Riley		717
By Jerry A. Wernberg		
her attorney	70	
Louis Wernberg		
By Jerry A. Wernberg		
his attorney	100	
Jerry Wernberg	100	
Estate of Charles Riley		
By George M. Riley, Administrator	1000	
George M. Riley	27560	
M. F. Riley	50	
Edward Barr	101	

718 *Exhibit BB, Annexed to Affidavit of O'Driscoll.*

Names		No. of shares
C. H. Jackson	(Certificate #335)	450
C. H. Jackson		5
W. F. Wagner		25
George R. Bidwell		5
E. H. Benn		15
H. A. Gildersleeve		1125
Marie R. Weed		227
George D. Perry		200
Wayne W. Wilson		225
Wayne W. Wilson		50
719 S. B. Dutcher		5
Wayne W. Wilson		25

I HEREBY CERTIFY that the foregoing is a true and correct copy, and that the original thereof is now on file in the Hamilton Trust Company of Brooklyn, New York.

WAYNE W. WILSON,
Secretary,
New York Electric Lines Co.

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720 RESOLUTIONS PASSED BY STOCKHOLDERS OF NEW YORK ELECTRIC LINES COMPANY APRIL 18th, 1905, EXTENDING OPTION TO PURCHASE STOCK.

WHEREAS, Messrs. Bidwell and Jackson have an option to purchase the stock of the New York Electric Lines Company and are about to apply for a permit to excavate trenches in the streets in which to lay conduits, in which to place electrical conductors for electric lighting, and also are about to close a contract with certain large telephone interests for space in said conduits, and

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WHEREAS, litigation may be necessary to enforce the rights of the New York Electric Lines Company to compel the granting by the City authorities of the permits needed by the Company to enable it to lay conduits and electrical conductors in and through the streets of New York City; and

WHEREAS, the financial and telephone interests which are about to become interested in the business of this Company, require of Messrs. Bidwell and Jackson a guarantee of delivery to them the stock of this Company held under option by them, 722
within sixty days after the final conclusion of the litigation above referred to, provided such litigation is found necessary;

NOW, THEREFORE, BE IT RESOLVED that the option for purchase and the extension thereof heretofore granted to Messrs. Bidwell and Jackson by the stockholders of the New York Electric Lines Company, be now and is extended for a period of two years from the 25th day of January, 1906, on the like payment of Messrs. Bidwell and Jackson of the sum of $416.67 to the Hamilton Trust Company of Brooklyn, N. Y., on the 25th day of each 723
month during the time of said extension, provided, that if there shall be litigation as contemplated, that if a suit or suits shall then be pending in the Court of Appeals or in the Supreme Court of the United States, then this option shall be extended by the stockholders of the New York Electric Lines Company for a term of sixty days after final decree in said Courts, provided, however, that the said Bidwell and Jackson for the New York Electric Lines Company shall have thirty (30) days after the final determination in the Court of Ap-

724 *Exhibit BB, Annexed to Affidavit of O'Driscoll.*

peals to appeal to the Supreme Court of the United States, and said option shall be extended until sixty days after final entry or decree in that Court.

RESOLVED that the Secretary of the Company is requested and directed to procure the approval of all the stockholders of the New York Electric Lines Company, of the above resolutions, by having their signature attached hereto, and to furnish a copy of same to Messrs. Bidwell and Jackson.

Dated, New York City, April 18th, 1905.

725

George M. Riley	27,560	shares
Estate Chas. Riley		
George M. Riley, Administrator,	1,000	"
Jesse Larrabee	400	"
Chas. J. Warren	1,001	"
Wayne W. Wilson	2,050	"
Herman G. Loew	1,375	"
C. H. Jackson	450	"
"	5	"
George R. Bidwell	5	"
H. A. Gildersleeve	1,125	"
M. Jennie Riley	50	"
Marie R. Weed	12,000	"
"	227	"
George D. Perry	200	"
Frederick B. Davies	100	"
R. Montgomery Schell	300	"
William F. Wagner	25	"
Edward Barr	100	"
"	1	"
Wayne W. Wilson Certificate #135	25	"
" " 213	100	"
" " 377	50	"
" " 391	25	"
" " 390	100	"

726

Exhibit BB. Annexed to Affidavit of O'Driscoll. 727

E. H. Benn	15	shares
H. D. W. Courtenay	25	"
Margaret A. Riley	70	"
Agnes Riley	70	"
M. F. Riley	50	"
Jerry A. Wernberg	100	"
Louis Wernberg By Jerry A. Wernberg, his attorney	100	"
C. S. Jackson Per C. H. Jackson	5	shares
Ethel C. Weed	500	" 728
Irene L. Weed	500	"
John A. Seely	25	"
Johnson S. Cary	75	"

I HEREBY CERTIFY that the above named and foregoing is a true copy of the original resolution adopted at a meeting of the Stockholders of the New York Electric Lines Company on the 18th day of April, 1905, the original of which is on file in my office, and the same is fully spread upon the Minutes of the Meetings of the Stockholders, and the signatures hereto are true copies of the original, together with the number of shares re- 729 spectively set opposite to each name.

WAYNE W. WILSON,
Secretary.

I hereby certify that there is on deposit with the Hamilton Trust Company of Brooklyn, New York, a further number of shares as follows:

Bainbridge Hinkley	71	shares
Frank Elliot	50	"
Silas B. Dutcher	5	"

The above have signed the original option and the extension thereof.

WAYNE W. WILSON,
Secretary.

730 **Affidavit of A. Lawrence Jensen, Read in Opposition to Motion.**

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus
731 directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

County of

A. Lawrence Jensen, being duly sworn, deposes and says:

I am the President of the Empire China Works, a corporation situated in Brooklyn, New York, and my business address is 142 Greene Street, in said Borough.

732 That on or about July 17, 1906, I received from the Great Eastern Telephone Company two unsolicited communications through the mails, undated but the first of which had the date June 29, 1906, upon the last page, copies of which are hereto annexed and marked Exhibits G and H.

A. LAWRENCE JENSEN.

Sworn to before me this
27th day of July, 1910.

LUTHER G. GORWITH,
(Seal) Notary Public,
Kings Co.

Exhibit G, Referred to in Affidavit of A. L. Jensen, Read in Opposition to Motion. 733

GREAT EASTERN TELEPHONE COMPANY

32 Broadway, New York City.

TO THE STOCKHOLDERS AND DIRECTORS:

The Great Eastern Telephone Company completed its organization as a HOLDING COMPANY in May of last year, and the next four months was occupied in preparatory work. Last September it 734
procured the organization of its construction and operating company under New York laws and began a canvass of the city for subscribers, resulting in over 105,000 orders for telephone service, fully 100,000 of which are with people of unquestioned financial responsibility.

These contracts are very largely for five years and will give the Company a net annual earning of fully $5,000,000. They have been carefully verified, tabulated, and are now in the vaults of the Company as an assurance of patronage as soon as the Company shall be able to complete its system. 735
The canvass was made in less than five months and demonstrated the fact that were the Company in a position to supply the service, 300,000 subscribers could be secured within one year.

In providing the necessary franchise privileges, 705 shares of the stock of the New York and Eastern Telegraph and Telephone Company, owning the Brooklyn franchise, have been purchased and paid for, giving the Great Eastern a majority of the stock of that company. It has also secured an option upon the stock of the New York Electric Lines Company, with which it has made a contract

736 *Exhibit G, Referred to in Affidavit of A. L. Jensen.*

providing itself with necessary franchise facilities in the old City of New York, comprising the boroughs of Manhattan and the Bronx. Both of these franchises are *perpetual* and are sure to be very profitable as the population of the city increases.

Both franchises have been the object of attack by opposing interests and in each case we have been sustained by the courts. In the case of the Brooklyn franchise, the matter was carried to the Court of Appeals and in the report of the Commissioners of Electrical Subways, we find this
737 statement:

> "It remains now to be added, that an appeal was taken to the general term of the Supreme Court and also to the Court of Appeals of this State, both courts affirming the decision of Justice Gaynor. In compliance with said mandamus, permissions of this Board have been issued to the New York and Eastern Telegraph and Telephone Company."

In the matter of the New York Electric Lines Company, the Corporation Counsel claimed in his
738 opinion that "the New York Electric Lines Company has no valid franchise or rights in the city, nor has it a legal corporate existence."

Upon this question we went to the courts for a legal determination, asking a mandamus to compel the Commissioner to allow us to build our own conduit system for the accommodation of our wires. Upon the question of the validity of the company's charter, Judge Bischoff decided that the company "DID CONFORM TO THE CONDITIONS OF THE STATUTE, AS EXPRESSED." The Judge further continues: "THE CORPORATE LIFE OF

739

THE RELATOR (company) WAS NOT THEREFORE BROUGHT TO AN END BY THE STATUTE."

In the opinion of Judge Bischoff as to the validity of the franchise, the court says: "SO, TOO, IT MAY BE HELD THAT THE FRANCHISE FROM THE CITY, OBTAINED BY THE RELATOR (company) IN THE YEAR 1883, WAS IRREVOCABLE BY THE CITY, BECAUSE NOT FORFEITED BY ANY TERM OF THE AGREEMENT ITSELF."

740

The decision of the Court, therefore, sustains the validity of the charter and the irrevocabilty of its franchise, yet maintains in the refusal to grant a mandamus to the company for an "INDIVIDUAL RIGHT to open the streets for the laying of electrical conductors IN CONDUITS OF ITS OWN," that the rights for the building of such conduits under its charter had passed to the city for a general subway system. On this question the Court says:

> "This application is based upon the relator's franchise to lay wires under the streets, and is not founded upon facts showing the failure of the respondent (city) to provide sufficient general facilities for the operation of electrical conductors. Indeed, the only facts presented upon this branch of the subject are contained in the respondent's papers, and disclose the sufficiency of the present system to meet all requirements."

741

Under these decisions we find ourselves provided with adequate franchise facilities in the old City of Brooklyn, where we are permitted to construct our own subways, while our rights are maintained in

742 the old City of New York, conditioned, however, upon the use of the subways which will undoubtedly be taken over by the city in accordance with an action already brought for that purpose. Thus, within one year of our organization, do we find ourselves in possession of two adjudicated franchises under which to operate, while our records show more than 100,000 subscribers, covering the use of approximately 150,000 telephones.

The value that may be placed upon these rights can scarcely be estimated, except possibly by the
743 negotiations which have taken place between the Atlantic Telephone Company and the city, in which the former offered to pay the city $3,000,000 in cash and the unlimited use of 1,000 telephones for the sole privilege of doing a telephone business for a period of twenty-five years. Such a privilege did not contain the rights of building any subways such as we possess in Brooklyn, and the termination of the franchise in twenty-five years practically limits the business of the company to twenty years, as, in all probability, it would require a company five years in which to install a complete system.

744 Under such a franchise as the city is at present able to grant, a company must of necessity charge off approximately 5 per cent. a year of the cost of its plant on account of the limitation of its franchise, while a perpetual franchise constantly grows in value, approximately 5 per cent. a year, as the natural increase of population increases the value of a perpetual franchise arithmetically. In other words, a franchise valued at $3,000,000 in cash and $6,000,000 in telephone service at the present time, such as offered by the Atlantic Telephone Company would, by the natural growth of population, be worth twice that value twenty years hence.

Exhibit G, Referred to in Affidavit of A. L. Jensen. 745

PREREQUISITES SECURED.

Before the actual construction of such a system as the one we have undertaken, we must not only complete our corporate organization, b[illegible] much other work is necessary, most of which we have now accomplished. It was necessary that we secure control of a franchise for the old City of New York; we secured that control. It was necessary for us to secure the control of the stock of the New York and Eastern Telegraph and Telephone Company owning the Brooklyn franchise; we have secured 746
that control. It was necessary that we secure long-distance connection with the 2,500,000 or 3,000,000 Independent telephones operated within speaking distace of New York; we have secured that connection through the Inter-Ocean Telephone and Telegraph Company. It was necessary that we should provide ourselves with suburban connection with the cities lying within thirty miles of New York; we have secured that connection through the State Line Telephone Company. It was necessary that we establish the question of "public necessity" in order to make one of our franchises operative; we have established that by 747
contracts with over 105,000 citizens of New York. It was necessary that we provide ourselves with manufacturing facilities; we have accomplished this through a contract with the Century Telephone Manufacturing Company. It was necessary that we provide ourselves with improved facilities for the installation of a service within the reach of every householder which would be practically as universal as water or gas; we have accomplished that by securing *without royalty* the use of the Reynolds Multiplex Telephone System, by which we

748 can give *private service over party lines.* It was necessary that our franchise rights be irrevocably established; this has been accomplished so far as the Brooklyn franchise is concerned, which has been sustained in the highest court in the State, while the rights under the franchise for the old City of New York have now been sustained by the Supreme Court of this county. In fact, we have accomplished every purpose we have attempted, winning one victory after another until we have become recognized by the conservative element of
749 the community as universally successful.

During this period of achievement, we have caused consternation in the camp of the monopoly by bringing to the attention of the city authorities, the fact that the hitherto telephone monopoly has been doing business in New York for more than a quarter of a century without a franchise, and action has already been taken by the Board of Apportionment to compel the Bell interests to secure a 25-year franchise upon terms satisfactory to the city, including the surrender of its conduit system, which the city now claims by right. This additional handicap will result to our advantage. We
750 have indirectly caused two reductions in telephone rentals during the past year, and will continue our agitation for telephone competition until telephone service is as cheap in New York City as street car service. We have established a rate for telephone service practically one-half the rates charged by monopoly before we entered the field, which will save to the citizens of New York between $10,000,000 and $12,000,000 a year, while the 2 per cent. of our gross receipts payable to the city under the terms of the franchise will not prove burdensome.

751

This has been accomplished largely through popular stock subscription, showing that the small investor appreciates the efforts being made, recognizing at the same time the enormous profits in the business even at the reduced prices established.

In the work thus far accomplished, not one dollar has been appropriated for promotion, and no officer or director of the Company has ever received a dollar from its treasury; it being the purpose of the management to conduct its affiairs until it is firmly established before burdening it with the responsibilities usually attendant upon 752
new enterprises. It has been carefully and conservatively managed absolutely devoid of the manipulation incident to "high financing" and its stockholders have been placed upon the same footing as its incorporators. Its Preferred Stock has been sold at par, with a Common Stock bonus and the money legitimately employed for the benefit of the Company.

In offering its stock at popular subscription, it does so with the firm belief that it occupies the richest telephone field in the world, that its rights are secured by incontestable franchises, that 753
its property must increase in value and that its securities will prove the most profitable investment of any public service corporation in this city. Its contracts for long distance and suburban service are exceptionally valuable and will turn into the treasury of the Company fully $500,000 a year without the expenditure of a single dollar. Its mechanical advantages will reduce the cost of construction fully 50 per cent., enabling the Company to establish its system at from 1-6 to 1-10 of the present capitalization of its competitor, while the superiority of its mod-

754 *Exhibit G, Referred to in Affidavit of A. L. Jensen.*

ern construction will enable it to secure and retain a patronage vastly in excess of that at present, enjoyed by the monopoly.

Very respectfully,

D. A. REYNOLDS,
President.

See letter from Attorneys on following page.

755 A Judicial Analysis.

June 29, 1906.

MR. D. A. REYNOLDS,

President, Great Eastern Telephone Company,
32 Broadway, New York City.

DEAR SIR:

In reply to your request for a clear statement of the scope and effect of the opinion and decision rendered by Mr. Justice Bischoff in the mandamus
756 proceedings, we write:

The peremptory mandamus was asked by us on behalf of the New York Electric Lines Company to compel the Commissioner of Water Supply, Gas and Electricity to issue permits to the Company that it might build its own conduits in the streets for its wires. The City resisted the mandamus, attacking the validity of the Company's charter and its franchise. The corporation counsel claimed that the Company has no valid franchise or rights in the streets of the City, that it is without legal corpor-

ate existence, and the Commissioner to whom the application for a permit to open the street was made by advice of the corporation counsel denied it for the following reason: "The New York Electric Lines Company has no valid franchise or rights in the streets of the City nor has it a legal corporate existence." On behalf of the City the further claim was made before the Court that whatever franchise the Company ever had, had been revoked by a recent resolution of the Board of Estimate and Apportionment, passed in May, 1906, after the application of the Company had been filed with the 758
Commissioner.

Mr. Justice Bischoff reviews, in his opinion, each one of these contentions, and overrules them all, holding that the Company "did conform to the conditions of the statute as expressed," and that "the corporate life of the relator (company) was not, therefore, brought to an end by the statute."

He upholds the validity of the Company's franchise, holding "that the franchise from the City obtained by the relator (company) in the year 1883 was irrevocable by the City, because not forfeited by any term of the agreement itself." After thus upholding all of our vital contentions, 759
the learned Justice denies the mandamus on the sole ground that the legislature, by what are known as the Subway Acts, passed in 1885, "modified" (but did not and could not revoke) the Company's franchise to this extent, and to this extent only, that if it did not submit a suitable plan for conduits within a given time, that then and thereafter it must put its wires in conduits to be furnished to it under some comprehensive system to be devised by the City authorities. Such a comprehensive system was

devised, and is now operated, by the Empire Subway Company, and, according to this opinion, that Company or the City under its contract, is obliged to see to it that the New York Electric Lines Company has ample and adequate facilities placed at its disposal under the streets of the City in the conduits to be furnished to it by the City or the Empire Subway Company.

The opinion clearly implies that if after due application made to the City for this accommodation beneath the streets in the conduits of the Empire
761 Subway Company, it should fail to receive the space that it needs that then a peremptory mandamus, such as was asked for, might be granted.

Putting the matter in another form and summing up what we have said about it, we may say that Mr. Justice Bischoff holds:

That the Company's corporate life is unimpaired.

That the Company's perpetual franchise is irrevocable.

That it has not been modified, except in that part of it which allows it to lay its own conduits in the streets; and

762 That as to that right it still exists, if the City does not give it adequate facilities to do its telephone business in conduits built and owned by the City or by the Empire Subway Company.

Trusting that this will answer you inquiry,

Yours faithfully,

ALTON B. PARKER,
CHARLES W. DAYTON,
BLACK, OLCOTT, GRUBER & BONYNGE,
J. ASPINWALL HODGE,
FRANK B. VERMILYA,

Exhibit "H," Annexed to Affidavit of A. Lawrence Jensen, Read in Opposition to Motion. 763

GREAT EASTERN TELEPHONE COMPANY

Offers

$100,000 OF ITS 6% CUMULATIVE PREFERRED STOCK AT PAR

With an Equal Amount of Common Stock Bonus

764

AUTHORIZED CAPITAL

$15,000,000 Preferred Stock
$15,000,000 Common Stock

This Company is the PARENT OR HOLDING COMPANY for the several rights and interests necessary for a complete, comprehensive telephone system in the City of New York covering perpetual franchise rights in both the old Cities of New 765
York and Brooklyn; contracts for over 100,000 telephones guaranteeing an annual earning of over $5,000,000; contracts for long-distance and suburban connection securing a very large annual revenue for the privilege of New York City connection; the rights of the Reynolds multiplex system of *private service over party lines;* provisions for manufacturing its own telephones and switchboards without royalty, while its affiliations with other Independent telephone companies are certain to prove very remunerative.

766 *Exhibit "H," Annexed to Affidavit of A. Lawrence Jensen.*

It occupies a field conceded to be the richest in the world, and will ultimately exercise a great influence with the thousands of Independent telephone systems throughout the country, by reason of its possession of the key to the telephone situation. Its competitor has no franchise to do a telephone business from the City of New York, and any franchise that it may hereafter obtain is limited by law to twenty-five years. The city has brought action to secure control of the conduit system now con-
767 trolled by our competitors, claiming under its contract, unpaid earnings sufficient to practically cover their entire cost.

The Great Eastern Telephone Company, by reason of its improved facilities, will be able to install a much superior system to the present, at a cost of practically one-sixth (1-6) the capitalization of the companies now occupying the field, while it will be absolutely free from royalties for the use of its apparatus.

Subscribers to this allotment will be entitled to all future rights and privileges accorded stock-
768 holders, and are privileged to pay for the same in ten equal monthly payments, or will be allowed 6 per cent. discount for 4½ months if paid in full at the time of subscribing. For full paid subscriptions received within the next ten days, certificates of stock will be issued under date of July 1, 1906, and begin to draw dividends from that date. Make checks to the order of the GREAT EASTERN TELEPHONE COMPANY, 32 Broadway, New York City.

(See franchises over.)

Exhibit "H." Annexed to Affidavit of A. Lawrence Jensen. 769

.....

APPLICATION FOR PREFERRED SHARES.

Partial Payment.

Date.....1906.

GREAT EASTERN TELEPHONE COMPANY,

32 Broadway, New York City. 770

Gentlemen:—I enclose my check herewith for.. .....dollars as first payment of $10 per share on.....shares of the Preferred Stock of the GREAT EASTERN TELEPHONE COMPANY (fully paid and non-assessable, par value $100), and hereby agree to pay the balance in nine equal monthly payments (from this date) of $10 each per share, this subscription to draw the same amount of Common Stock bonus represented by Voting Trust Certificates, the whole to be issued upon final payment and the Preferred Stock to draw cumulative dividends at the rate of 771
6 per cent. from date of issue. If the allotment be oversubscribed, I agree to take a lesser amount, applying the enclosed check in payment of some. Six (6) per cent. discount allowed for anticipated payments.

Address .....

Fill out, sign and mail this application with your remittance to the New York office.

Name .....

772 *Exhibit "H," Annexed to Affidavit of A. Lawrence Jensen.*

Subway Franchise, Borough of Brooklyn—Ex. A. Granted in 1894.

RESOLVED, that the assent of the Corporation of the City of Brooklyn, State of New York, be and the same is hereby given to the New York and Eastern Telegraph and Telephone Company, a corporation duly organized under the Laws of the State of New Jersey, certificates of such incorporation being duly filed with the Secretary of the State of
773 New York on March 27, 1894, to its successors, lessees and assigns, to establish and maintain a system or systems of telegraphing and telephoning, and other methods of transmission by sound, air or electricity, for public and private use throughout the City of Brooklyn, and for these purposes to open streets, avenues, roads, lanes, highways and public places in said City, for the placing of conduits, tubes, wires, conductors, cables, insulators and all necessary appliances for the business and object of providing means for communication between buildings, structures and edifices, public or private, and for such purposes as shall be connected
774 with and necessary to the successful conduct of the business proposed by this Company, provided all wires shall be underground except as otherwise permitted by the Subway Commission.

PROVIDED, That the position and depth of said wires in the several streets, avenues, roads, lanes, highways and public places of the City shall be determined and established by the Commissioner of the City Works, and when once placed the position of these wires shall not be changed except by his consent, first had and obtained.

Exhibit "H," Annexed to Affidavit of A. Lawrence Jensen. 775

PROVIDED, That an accurate map be procured at the expense of the New York and Eastern Telegraph and Telephone Company, showing the position of all conduits, tubes and wires, laid by said Company, their branches and detours, and all extensions wherever made up to the first day of January of each year, shall be filed with the Commissioner of the Department of City Works on or before the fifteenth day of January of each year, and the New York and Eastern Telegraph and Telephone Company shall at its own expense restore, 776
keep and maintain in good repair for the period of one year after the completion of such work, such part of the streets, avenues, lanes, highways, roads, and public places over and above where they shall have been opened for the construction of conduits or the laying of wires or tubes by said Company, and at a grade to conform with the grade of the street or to such a grade as the Commissioners of the Department of City Works may establish.

PROVIDED, That the Commissioner of the Department of City Works shall appoint such inspectors as he may deem necessary for the supervision 777
of the work proposed by the said Company as far as it relates to the opening or repaving of the streets, placing of poles, etc., and that the cost of such inspection, and supervision shall be paid monthly by the New York and Eastern Telegraph and Telephone Company to the Treasurer of the City of Brooklyn, the amount to be determined by the Commissioner of the Department of City Works.

PROVIDED, That the said New York and Eastern Telegraph and Telephone Company, its succes-

sors or assigns, shall, beginning with January 1st, 1895, and every six months thereafter, pay to the Treasurer of the City of Brooklyn one per cent. on the gross receipt of revenues derived from whatsoever source for six months preceding, and for the purpose of determining such receipts, all the books, papers, etc., of the New York and Eastern Telegraph and Telephone Company shall be open for inspection and examination by the City authorities.

779 PROVIDED, That the said New York and Eastern Telegraph and Telephone Company, its successors and assigns, shall permit the City of Brooklyn to place the electrical wires of the Fire and Police departments in its conduits, tubes or other underground channels without the charge to the City or either of said departments.

PROVIDED, That the New York and Eastern Telegraph and Telephone Company shall furnish to the City of Brooklyn for local uses telephonic service at a price not exceeding forty dollars per annum for each instrument used, and the price for
780 local uses to the general public shall not exceed seventy-five dollars per annum for each instrument used.

PROVIDED, That some portion of the work shall be completed by January 1st, 1895, and wires and instruments shall be in place for service.

PROVIDED, That the New York and Eastern Telegraph and Telephone Company shall before beginning the construction of its lines by opening any street, road, lane, avenue, highway, or public places

781

of the City as herein authorized, furnish to the City of Brooklyn a bond with such sureties as shall be approved by the Mayor of the City, and for such reasonable amount as he may determine, that it will faithfully carry out the objects proposed in these resolutions and hold the City of Brooklyn harmless from any cause of actions resulting from negligence in its construction or in the operations of its lines.

782

Subway Franchise, Boroughs of Manhattan and Bronx—Ex. B. Granted in 1883.

RESOLVED, that permission be and hereby is granted to the New York Electric Lines Company, to lay wires or other conductors of electricity in and through the streets, avenues and highways of New York City and to make connections of such wires or conductors underground by means of the necessary vaults, test boxes and distributing conduits, and thence above ground with points of electric illuminations or of telegraphic or telephonic signals in accordance with the provisions of an 783
"Ordinance to Regulate the Laying of Subterranean Telegraph Wires and Electric Conductors in the Streets of the City" passed by the Common Council and approved by the Mayor December 14, 1878, provided, however, and it is hereby ordained, and

RESOLVED, That whenever the said New York Electric Lines Company, in the progress of laying its lines of Electric conductors, shall be prevented or obstructed from placing its wires in the spaces which may have been generally selected under the ordinance passed and approved as aforesaid, by

784 manholes or sewer, gas, steam or water mains or other underground or pavement impediments, now and heretofore existing, then and in such cases the said Company may, under the privileges hereby granted, vary the space selected by adopting, appropriating and using equivalent and nearest practicable spaces as may be found necessary; and provided further, and it is hereby further

785 RESOLVED and ordained, that the connection vaults aforementioned may be extended underground no more than four feet in depth or two feet in any lateral direction beyond the limited spaces contemplated for the lines of wires in the ordinance passed and approved as aforesaid and may be fitted with covers or other means of access at the level of the pavements of the several streets and avenues.

786 RESOLVED, that in addition to the requirements and provisions to be observed contained in the said ordinance, the said New York Electric Lines Company, as a further compensation for the opening and use of the streets of the City, shall pay into the City Treasury, within ten days after taking up the pavements, for each one thousand feet in length of trench, to be excavated, the maximum sum or sums of money which have been, or which may hereafter be required of grantees, or licenses to be paid under any general or special Ordinance of the Common Council heretofore enacted, authorizing the laying of Electric Conductors under the Streets of the City.

RESOLVED, that the permission of the said New York Electric Lines Company hereby intended by

Exhibit "H," Annexed to Affidavit of A. Lawrence Jensen. 787

the Common Council is conditioned that the said Company shall not transfer or dispose of the franchise hereby granted without the further authority of the Common Council, and that it will make no discrimination of individuals or corporations in the rental and use of its lines or wires which may be laid down hereunder.

RESOLVED, that the City shall have the option, after the first day of January, 1885, to require the said New York Electric Lines Company to pay into 788
the City Treasury two per cent. of its gross receipts derived from the rental of its wires under the franchise hereby granted in lieu of the donation to the City of the two wires in each line of conductors, as provided in the General Ordinance passed and approved as aforesaid, and said option may be declared at any time after the said first day of January, 1885, by resolution of the Common Council.

789

790 **Affidavit of Richard W. Bainbridge, Read in Opposition to Motion.**

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

791

County of Kings, ss.:

Richard W. Bainbridge, being duly sworn, says:

That he is engaged in business at No. 2 Cumberland Street, in the Borough of Brooklyn, City of New York.

That on or about April 30, 1910, he received
792 from the Great Eastern Telephone Company an unsolicited communication through the mails, dated April 30, 1910, which is hereto annexed, marked Exhibit A.

That enclosed with such communication was a circular hereto annexed and marked Exhibit B, and a statement of figures hereto annexed and marked Exhibit C, and a blank for subscription hereto annexed and marked Exhibit D.

Later, and on or about July 14, 1910, he received a communication from the Great Eastern Telephone Company, a copy of which is hereto annexed and

marked Exhibit E, with enclosures all in one wrapper hereto annexed and marked Exhibit F.

(Signed) R. W. BAINBRIDGE.

Sworn to before me this
18th day of July, 1910.

FRANK B. RYDER,
Notary Public, Queens County,
Certificate Filed in Kings County. 794

Exhibit A, Referred to in Affidavit of R. W. Bainbridge, Read in Opposition to Motion.

Telephone
Cortlandt 5623-4.

Affiliated
Independents.

GREAT EASTERN TELEPHONE COMPANY

(NEW YORK CORPORATION)

795

THIRTY CHURCH STREET

(MCADOO TERMINAL BUILDING)

New York, April 30, 1910.

Mr. Richard W. Bainbridge,
2 Cumberland St.,
Brooklyn, N. Y.

Dear Sir:—

You will undoubtedly be interested to know that the long litigation which has deprived New York

796 *Exhibit A, Referred to in Affidavit of R. W. Bainbridge.*

City of telephone competition is ended, that the Supreme Court has declared our franchise "irrevocable," while the highest court in the State has determined our right to enter the present conduit system. This means better service, cheaper rates and wider long-distance connection.

We have secured over 107,000 contracts with subscribers (mostly 5 years), perfected engineering plans covering the survey of over 18,700 city blocks, voted to increase our capital to $50,000,000, and
797 will start construction absolutely free from debt, no liabilities, no promotion and no entangling alliances.

To bring the Company more closely in touch with the public and protect the control of our enterprise by a wider distribution of the stock, it has been decided to offer, subject to prior sale, any part of the following initial allotments for popular subscription, at the prices named:

4,125 shares, par value $100, at $20 per share,
5,000 shares, par value 100, at 25 per share,
798 5,000 shares, par value 100, at 30 per share,
5,000 shares, par value 100, at 35 per share,
5,000 shares, par value 100, at 40 per share,
5,000 shares, par value 100, at 45 per share,
5,000 shares, par value 100, at 50 per share,

Unsubscribed stock will be taken by the directors.

The proceeds of the above allotments will install at least 20,000 telephones, after which the stock should find a ready market at very much higher prices. If this be true you want part of this offering, and the way to determine this is to read the

Exhibit B. Referred to in Affidavit of R. W. Bainbridge. 799

enclosures. If you decide "Yes," then try to get some of the first.

Sincerely yours,

GREAT EASTERN TELEPHONE COMPANY,
Per C. L. WITHROW.

CLW/GC.

800

Exhibit B, Referred to in Affidavit of R. W. Bainbridge, Read in Opposition to Motion.

MOTTO:
Please the People and
they will please you.

THE GREAT EASTERN TELEPHONE CO.

(New York Corporation)

PLANS FOR A METROPOLITAN TELEPHONE SYSTEM 801

ORGANIZATION.

This Company was organized under the Telephone Section of the Transportation Corporations Law of the State of New York in October, 1905, receiving one of the broadest charters ever granted by the State. In order to test public sentiment, it instituted a partial canvass of the City, which resulted in over 107,000 contracts for telephone ser-

802 *Exhibit B, Referred to in Affidavit of R. W. Bainbridge.*

vice, a very large proportion of which is for five years from date of connection, showing a gross earning of nearly $16,000,000 a year. Later it entered into a 99-year contract with the Inter-Ocean Telephone & Telegraph Company for long-distance connection, and with the State Line and Coast Line telephone companies for suburban connection, upon a basis that should net the Great Eastern Telephone Company at least $500,000 a year for terminal facilities alone; in both cases wholly without invest-
803 ment on the part of the Company.

In addition to these valuable contracts, it has secured the rights under the Denio patents for a telephone fire-alarm system especially adapted to residences, stores and factories in conjunction with telephone wires, under which the Denio General Electric Company are to install their system free of cost and pay to the Great Eastern Telephone Company one-half its gross receipts. In localities where this system is now installed, the rebate in insurance premiums more than covers the cost of installation. This contract should yield a net rev-
804 enue to the Company in excess of $250,000 a year as a by-product.

Preparatory to the construction of a modern Telephone system, the Company has caused to be prepared a set of engineering plans covering the survey of over 18,700 city blocks, 56 central offices, an immediate installation of 600,000 telephones, with an ultimate capacity of 1,000,000 telephones. Its traffic tables show a capacity for handling more than 6,000,000 messages per day, besides its long-distance, suburban and pay-station service. These latter items alone are estimated (on the basis of the present system) to yield fully $2,500,000 per

year. Its first exchange in the Wall Street district will have a capacity of 30,000 messages per hour.

The Company has provided itself with a system vastly superior to that now in use in New York City, secured by broad basic patents, through the use of which more than $5,000,000 will be saved in the cost of installation, while the Company will be able to serve a class of customers heretofore thought unprofitable. By its use it is possible to install as many as eight telephones on a single pair of wires and render an absolutely private service to resi- 805
dences at $1 per month, while the business rate will be correspondingly low.

FRANCHISE RIGHTS

The franchise rights of the Great Eastern Telephone Company consist of a PERPETUAL LEASE of the telephone and telegraph rights under a franchise granted by the Board of Aldermen of the City of New York; a wire renting franchise granted to the New York Electric Lines Company in 1883, which has been successfully adjudicated and sustained by the highest court in the State. The City 337
has recognized the legality of the franchise, the highest court in the State from which there is now no appeal has determined the right of the Company to the use of the conduit system owned by the Empire City Subway Company, while the laws under which the conduits were constructed, gives to the Great Eastern Telephone Company every right that it may require.

THE DECISION OF THE SUPREME COURT says: "The corporate life of the relator (Com-

pany) was not, therefore, brought to an end by the statute. * * * So, too, it may be held that the franchise from the City obtained by the relator in the year 1883 was irrevocable by the City, because not forfeited by any term of the franchise itself."

808

THE CITY'S BRIEF BEFORE THE APPELLATE DIVISION says: "It is well to bear in mind that the present claim of the relator is not the right to lay wires in subways, a right which no one disputes. * * * If the subways of the Empire City Subway Company are not sufficient, means can readily be found for the construction of other subways."

809

THE COURT OF APPEALS DECISION says: "The essential purpose of the relator's incorporation and of the permission acquired by it April 10, 1883 (franchise), was to lay electric conductors, and its rights in that respect have not been materially or essentially violated or impaired. The only effect of the statutes and contracts made in pursuance thereof (the subway acts) is to require that the electric conductors to be laid by the relator shall be placed in conduits constructed in accordance with the general plan."

810

THE SUBWAY STATUTES PROVIDE: "The spaces in said subways, conduits and ducts shall be leased by the party of the second part (subway company) to any company or corporation having lawful power to operate telegraph or telephone conductors. * * * If at any time the space in such subways, conduits and ducts shall not be sufficient for all corporations or companies so apply-

811

ing for the same, or for the City of New York or any of its departments, the additional space needed shall be provided by the party of the second part, at its own cost by the construction, maintenance, equipment and operation of additional subways. * * * All companies occupying space in said subways, conduits and ducts shall own their own conductors and shall have the full management and control thereof, but such management and control shall be subject to the rights of all other occupants of said subways." The subway company has given 812
a bond of $250,000 "securing the just and full performance of this contract, and the building or providing of said subways," and the statutes further provide that "if at any time, in the opinion of the parties of the first part (subway commission) or their successors (now the Commissioner of Water Supply, Gas and Electricity) there shall be a substantial failure * * * the Mayor, Aldermen and Commonalty of the City of New York may enter into possession of such conduits," etc.

LEGAL AFFAIRS.

813

The legal affairs of the Company have been conducted by Hon. Alton B. Parker, Hon. Charles W. Dayton (now Supreme Court Justice), the firm of Black, Olcott, Gruber & Bonynge, J. Aspinwall Hodge, Frank B. Vermilya of this city and Tracy C. Becker of Buffalo, assisted in the Court of Appeals by Hon. David B. Hill. Since the decision in the Court of Appeals, the legal status of the Company has been most thoroughly investigated by four prominent New York firms of attorneys, one firm of attorneys in Philadelphia and three in St. Louis, all of whom have rendered to their clients favorable reports.

814 *Exhibit B. Referred to in Affidavit of R. W. Bainbridge.*

VALUE OF FRANCHISES.

No price has ever been placed upon the franchise, as it has been the purpose of those in control to develop such rights to their fullest capacity. A comparison of values, however, may not be out of place. The Bell interests in New York City now operating under a "revocable permit" granted by the Board of Electrical Control (which the courts have decided had no franchise granting power) in
815 a communication dated July 13th, 1906, offered the City $3,500,000 in cash and $4,065,000 in rebates on telephone rentals for a 25-year franchise; while the Atlantic Telephone Company about the same time offered $250,000 in cash upon the granting of the franchise, from 1% to 7½% of gross receipts and $8,124,000 in telephone rentals for a 25-year franchise, both of which offers were rejected by the City. Under the Greater New York charter, no franchise can now be granted for a longer term than 25 years. Under the Ford Franchise Tax Law, which assesses franchises the same as real estate, some of
816 the assessments for 1909, show as follows:

Empire City Subway Company (Limited)	$ 8,900,009
Edison Electric Illuminating Co., Brooklyn	11,500,000
Brooklyn Union Gas System	17,955,000
Metropolitan Street Railway Company	20,258,000
Interborough Rapid Transit Company	24,012,000
Brooklyn Rapid Transit System	55,252,000
Manhattan Railway Company	78,500,000
Consolidated Gas System	82,676,000

Exhibit B, Referred to in Affidavit of R. W. Bainbridge. 817

ADVANTAGES ENJOYED BY GREAT EASTERN COMPANY.

The Court decision provides that "the electric conductors to be laid by the relator SHALL BE PLACED in conduits constructed in accordance with the GENERAL PLAN." This decision renders the construction of a new conduit system unnecessary, saving to the Company fully $15,000,000 in its construction account, while giving it all the advantages enjoyed by any other public service 818
company in the city, about 30 of which are now occupying the conduits. The rental of these conduits will vary in accordance to the density of population; from 28c. per year per telephone in the congested Wall Street district, to 90c. per year per telephone in the less populated districts. The average cable radius is less than 1,000 feet in the congested Wall Street district, while the entire average for Manhattan will be considerable less than one-half mile.

The cost of the cable plant for the Wall Street district has been estimated by the Standard Underground Cable Company of this city, who have 819
offered to supply the cables, draw the same into the conduits and splice them ready for the connecting wires on one end and a switchboard on the other, at a price that will cost the Company less than $3 per telephone circuit; while the entire cost of the telephones, switchboard, cables, and wire plant installed is estimated not to exceed $60 per telephone. This does not include real estate or conduits, both of which can be secured on rental at a combined cost not to exceed $1.50 per year per telephone. The small radius

820 for each exchange reduces the cost of maintenance and operation, while an all-underground system has very little deterioration.

The average revenue from each circuit (pair of wires) under the 107,000 contracts already secured by the Great Eastern Telephone Company, will exceed $50 per year at half rates for the first year, fully 70% of which will be net profit. The opposition is capitalized at about five times the cost of our system, is paying interest on $28,461,000
821 Bonds, and enormous dividends on $85,672,000 capital stock, beside a large surplus each year which it invests in real estate. The Bell rate for unlimited service is $240 a year (at which price they refuse all future orders) with many contracts yielding in excess of $10,000 a year each, while their minimum contracts are written at 8 cents a message.

INDEPENDENT TELEPHONE DEVELOPMENT.

822 Few comprehend the development of the telephone business, either in the Bell system (coamonly known as the monopoly) or under Independent telephone management, but all investors realize that the earnings have been very much in excess of the earnings of other public service companies. The report of the American Telephone & Telegraph Company (Bell) for 1909 shows 5,043 exchanges and 3,215,245 telephones, more than nine-tenths of which is the growth of the last fifteen years. During the same period, the Independent telephone companies have increased from nothing to over 21,000 companies, organizations and associations (U.

S. Census), the last copy of the Telephone Directory showing 16,487 commercial companies operating substantially 4,500,000 instruments.

This development is apparent from the number of Independent telephone companies operating in several of the leading states. Illinois has 947; Indiana, 785; Kansas, 679; Kentucky, 480; Minnesota, 491; Missouri, 766; Nebraska, 462; New York, 768; Ohio, 882; Pennsylvania, 584; South Dakota, 400; Texas, 453; Wisconsin, 850. These companies are listed as commercial companies and do not include farmer's lines. To illustrate the development where farmer's lines are included, it may be stated that in the State of Iowa alone, there are 3,434 organizations, of which 2,905 operate less than 100 telephones each. Of the vast number of Independent telephones now in use, fully 3,000,000 are within talking distance of New York City, and will be directly tributary to our system. 824

LONG DISTANCE SERVICE.

The Great Eastern Telephone Company will confine its operations to New York City (the richest telephone field in the world) connecting with the thousands of Independent companies through long-distance lines under contracts already executed, under which the Great Eastern Company receives a net percentage of all tolls received, in consideration of terminal facilities; the long-distance companies bearing all cost of installation, maintenance and operation. This not only supplies a superior long-distance service to our subscribers at greatly reduced rates, but affords the Company a very handsome income from the terminal facilities accorded. 825

826 *Exhibit B, Referred to in Affidavit of R. W. Bainbridge.*

THE BOARD OF DIRECTORS.

The Board of Directors of the Company are composed of business men of recognized standing, all of whom are interested in its success. The officers are men of experience with large Independent interests, while the Executive Committee is especially chosen for its knowledge of telephone construction. No person in the directorate has ever been associated with any sell-out to or amalgamation
827 with the Bell interests, while the By-Laws of the Company provide for the expulsion of any officer or director at any regular or special meeting of the stockholders by a majority vote, should his conduct jeopardize the Independence of the Company.

INDEPENDENCE ASSURED.

One-half of the stock of the Operating Company (New York Corporation) is pooled under an agreement for five years or until the Company earns 5% on its entire stock, while its traffic contracts with all companies with which it connects, contains the
828 following provisions:

> *"It is further mutually agreed that neither of the parties hereto shall sell, assign, transfer, lease or in any other manner dispose of its property or franchises to the American Bell Telephone Company, the American Telephone & Telegraph Company, their lessees or assigns, or to any person, firm or corporation antagonistic to the other, or enter into any contract or undertaking that shall in any manner curtail, impair or interfere with the provisions herein contained, for a period of* 99 *years from*

and after the date of this agreement, without the written consent of the other."

When it is taken into consideration that the monopoly has succeeded in buying less than 100 companies in 15 years out of a total of 21,000 companies now in existence, the above provisions ought to inspire confidence in the integrity of the enterprise.

TELEPHONE ITEMS OF INTEREST. 829

It costs 15 cents to talk with Jersey City, while the Ferry companies charge 3 cents for carrying the speaker. It costs 20 cents to talk from Brooklyn to the Bronx, yet our much hampered street car system charges a single 5-cent fare between the two boroughs.

The New York Metropolitan Traction System in New York City killed 343 and injured 2,704 persons in 1907, paying damages of $2,431,280, and legal expenses in connection with damages of $1,077,352, as against no injury by the telephone company. This is more than 5% on $70,000,000.

The electro-magnetic force necessary to drive a street car one mile on Broadway reduced to the requirements of telephone service will furnish 2,200 five-minute conversations. The street car companies must operate their cars on schedule time with or without passengers; but a telephone company never uses its current except during a conversation. 831

GREAT EASTERN TELEPHONE COMPANY,
D. A. Reynolds, President.

Hudson Terminal, New York City.

832 *Exhibit B, Referred to in Affidavit of R. W. Bainbridge.*

VERIFIED COPY OF THE FRANCHISE.

RESOLVED, that permission be and hereby is granted to the New York Electric Lines Company, TO LAY WIRES OR OTHER CONDUCTORS OF ELECTRICITY IN AND THROUGH THE STREETS, AVENUES AND HIGHWAYS OF NEW YORK CITY, and to make connections of such wires or conductors UNDERGROUND BY MEANS OF THE NECESSARY VAULTS, TEST BOXES AND DISTRIBUTING CONDUITS, and thence above ground
833 with points of ELECTRIC ILLUMINATIONS or of TELEGRAPHIC OR TELEPHONIC SIGNALS in accordance with the provisions of an "Ordinance to Regulate the Laying of Subterranean Telegraph Wires and Electric Conductors in the Streets of the City" passed by the Common Council and approved by the Mayor December 14, 1878, provided, however, and it is hereby ordained, and

RESOLVED, That whenever the said New York Electric Lines Company, in the progress of laying its lines of Electric conductors, shall be prevented or obstructed from placing its wires in the spaces
834 which may have been generally selected under the ordinance passed and approved as aforesaid, by manholes or sewer, gas, steam or water mains or other underground or pavement impediments, now and heretofore existing, then and IN SUCH CASES the said Company may, UNDER THE PRIVILEGES HEREBY GRANTED, VARY THE SPACE SELECTED by adopting, appropriating and using equivalent and nearest practicable spaces as may be found necessary and provided further, and it is hereby further

RESOLVED and ordained, that the connection vaults aforementioned may be extended under-

835

ground no more than four feet in depth or two feet in any lateral direction beyond the limited spaces contemplated for the lines of wires in the ordinance passed and approved as aforesaid and may be fitted with covers or other means of access at the level of the pavements of the several streets and avenues.

RESOLVED, that in addition to the requirements and provisions to be observed contained in the said ordinance, the said New York Electric 836
Lines Company, as a further compensation for the opening and use of the streets of the City, shall pay into the City Treasury, within ten days after taking up the pavements, for each one thousand feet in length of trench, to be excavated, the maximum sum or sums of money which have been, or which may hereafter be required of grantees, or licenses to be paid under any general or special Ordinance of the Common Council heretofore enacted, authorizing the laying of Electric Conductors under the Streets of the City.

837

RESOLVED, that the permission of the said New York Electric Lines Company hereby intended by the Common Council is conditioned that the said Company shall not transfer or dispose of the franchise hereby granted without the further authority of the Common Council, and that it will make no discrimination of individuals or corporations in the rental and use of its lines or wires which may be laid down hereunder.

RESOLVED, that the City shall have the option, after the first day of January, 1885, to require the

838 *Exhibit B, Referred to in Affidavit of R. W. Bainbridge.*

said New York Electric Lines Company to pay into the City Treasury two per cent. of its gross receipts derived from the rental of its wires under the franchise hereby granted in lieu of the donation to the City of the two wires in each line of conductors, as provided in the General Ordinance passed and approved as aforesaid, and said option may be declared at any time after the said first day of January, 1885, by resolution of the Common Council.

839

840

Exhibit C, Referred to in Affidavit of R. W. Bainbridge, Read in Opposition to Motion.

GREAT EASTERN TELEPHONE COMPANY

WALL STREET EXCHANGE.

The above map shows the territory covered by the first Exchange of the Great Eastern Telephone Company, with a line of conduit (shown in red) running to the McAdoo Terminal Buildings, where the Executive Offices of the Company are now situated and from whence long-distance lines will extend to connect with the West.

The engineering plans provide for 29,250 feet of conduit, 40,500 feet of 525-pair cable, beside smaller cables for block and building distribution; 10,000 telephone circuits and 8,500 circuits for private wire rental, costing $35,500 for street cable and $9,940 for drawing the cable into the conduits and splicing them, or a total cost of $2.45 per circuit. The entire cost of the cable and wire plant of the Exchange is estimated at $3.64 per telephone.

McAdoo Terminal Building, 30 Church Street, New York City.

GREAT EASTERN TELEPHONE COMPANY

Exhibit D, Referred to in Affidavit of Mr. R. W. Bainbridge, Read in Opposition to Motion.

.....1910.

ONE COMPANY,
York City.

Gentlemen:

Please enter my subscription for..... shares of the GREAT EASTERN TELEPHONE COMPANY, (New York Corporation) from the first allotment unexhausted at the time of receiving this subscription, for which find my check inclosed for $..... (being $5.00 per share subscribed) the balance to be paid upon delivery of the stock. Send certificates through the bank or express company indicated below.

....
Bank or Express Company Name

....
Address Address

Telegraph orders from responsible parties will be held 48 hours pending arrival of remittance. Stock of full paid subscriptions (which will be filled from the lowest unexhausted allotment) will be forwarded by registered mail.

WORTHY OF CONSIDERATION.

1—We will operate under a *perpetual*, adjudicated franchise.

2—The courts have declared it to be "*irrevocable* by the City."

Exhibit D, Referred to in Affidavit of R. W. Bainbridge. 847

3—We will use the best telephone service ever invented.

4—Our service will be *absolutely private*, even on party lines.

5—Our average cable radius, first exchange, will not exceed 1,000 feet.

6—Longest circuit, ordinary city, 3 to 4 miles. Our longest-circuit one-half mile. 848

7—Short cables mean less resistance, smaller wires and cheaper maintenance.

8—Some office buildings will contain more than 600 telephones.

9—Our street cables, drawn in and spliced, cost $2.45 per circuit.

10—Our wire plant including cables will cost $3.64 per telephone.

849

11—Conduit rental, first exchange, 28 cents per telephone per year.

12—Our "bi-products," such as wire rental, etc., will pay operating expenses.

13—A congested community and large buildings mean short cables.

14—One city block will contain more telephones than a town of 15,000 people.

850 *Exhibit D, Referred to in Affidavit of S. W. Bainbridge.*

15—Cheapest place to build, while prices are double that of other cities.

16—107,000 people have agreed to use our service; mostly 5-year contracts.

17—3,000,000 independent telephones are calling for connection with New York.

18—Our terminal facilities are worth $500,000 a
851 year to long-distance companies.

19—No idle investment in expensive conduits, maintained for future growth.

20—No royalties, no liabilities, no promotion and no entangling alliances.

21—Every officer and director is personally interested in our success.

22—Independence guaranteed by trusteeship and intercommunicating contracts.

852

23—Popular subscription of our stock insures against centralized control.

24—Our legal affairs are under the most competent counsel obtainable.

Exhibit E, Referred to in Affidavit of Mr. R. W. Bainbridge, Read in Opposition to Motion. 853

Telephone
Cortlandt 5623-4

Affiliated
Independents

GREAT EASTERN TELEPHONE COMPANY

(NEW YORK CORPORATION)

THIRTY CHURCH STREET

(MCADOO TERMINAL BUILDING) 854

New York, July 14th, 1910.

Mr. R. W. Bainbridge,
Brooklyn, N. Y.

Dear Sir:—

Your favor left with the writer the night before last, has remained until the present to be answered, because of a little indisposition on my part, which is laying me up at the house part of the time.

In addition to the information given you at the 855
time of your visit to the office, I think I should say to you that we are bringing mandamus proceedings against the Empire City Subway Company (Limited) for the conduit space required for our first exchange, and that the matter will come on for argument before Justice Bischoff (who decided the former case in our favor) next Monday. Throughout all of the litigation the court sustained the validity of our franchise, as will be shown by the enclosed opinion, but as that litigation was brought against the city to establish the validity of the franchise,

856 *Exhibit F. Referred to in Affidavit of R. W. Bainbridge.*

and the subway company was not made a party to the former litigation, the court was powerless to order the conduit company to accord space. This action is brought directly against the conduit company, and we are only asking for that right which was determined in the decision of Justice Bischoff and sustained by the Court of Appeals.

The diagram handed you by the writer, shows the relative position of the several companies and clearly illustrates how it is possible for us to have
857 secured these franchises, sustained them in the courts, expended over $200,000 in our engineering plans and other expenses amounting to considerably more than $1,000,000, while at the same time enabling the operating telephone company to go forward with its financing, absolutely free of debt and with no entanglements that can in any way retard it. There is absolutely no political debts, franchise expense or other drag upon the company, this having been provided by the parent or holding company, which will have a stock interest in the operating company. Further than this, we have an
858 advantage in placing all of the stock of the franchise companies in the treasury of the pioneer company, where it will remain intact, enabling us to develop the many rights under the franchises, by other operating companies. Under the plan proposed, in addition to the Great Eastern Telephone Company to which has been leased the telephone rights, we shall probably have an electric light company for Manhattan, another for the Bronx, one for Brooklyn, a pneumatic tube company for Brooklyn, a conduit company for developing the conduit privileges, and in all probability several cold storage and central heating companies, in

Exhibit E, Referred to in Affidavit of R. W. Bainbridge.

859

order to develop all of the rights under the two franchises. Some of the stock of all of these operating companies will go to the parent company, while the leases from the franchise companies will also bring a small annual revenue, thus thoroughly protecting the interests of the stockholders of the parent company.

Having taken over the franchises and executed the lease for telephone rights, we are now starting in to develop the telephone rights under the franchise of the Great Eastern Telephone Company of 860
New York, which will have $50,000,000 of stock capital and the same amount of bond capital. These securitites will be disposed of from time to time, as necessary to build the system. We have started the sale of this stock at $20 per share, and the first 5,000 shares were quickly taken at that price. We are now disposing of the second 5,000 shares at $25 a share, after which, in the ordinary course of events, the price will be advanced to $30 a share, unless in the judgment of the Board of Directors, a higher price will be demanded. There has been considerable talk since our action was brought for 861
the peremptory writ of mandamus, that should the court promptly grant such a writ, without permitting a stay to the conduit company, we should probably advance the price at once to $50 a share and maintain it there until the plant is completed, after which there will be no stock sold for less than par.

From an earning standpoint, we anticipate the cost of our first exchange to be not far from $40 per telephone, and not to exceed $60 per telephone, including 8,500 extra pairs of wire for private telephone service between banking houses and the sev-

862

eral commercial exchanges, such as the New York Stock, Consolidated, Wool, Produce and Cotton, within this district. The earnings per telephone will average something over $100 per circuit, while the private circuits will be placed at $100 per year, as against $300 per year, now charged by the Bell interests. As the entire cost of a private pair of wires and two telephones installed will not exceed $30, we feel that $100 a year is a pretty good return upon the investment.

863 Should you seriously contemplate an investment at this time, I would advise you to make whatever investment you desire at once, and I shall be personally very much gratified to give you any additional information which you may desire.

Trusting that you may give this the attention it deserves, I am,

Very truly yours,

D. A. REYNOLDS,
Per E. A.R

864 DAR/GC.

Mr. Reynolds, who dictated this letter, was obliged to leave the office before it was ready for signature.

"Exhibit F," Referred to in Affidavit of Mr. R. W. Bainbridge, Read in Opposition to Motion. 865

NEW YORK SUPREME COURT,

SPECIAL TERM—PART ONE.

PEOPLE ex rel. NEW YORK ELECTRIC LINES COMPANY

vs.

WILLIAM B. ELLISON, Commissioner, &c., et al. 866

Application for peremptory writ of mandamus.

ALTON B. PARKER, TRACY C. BECKER, J. ASPINWALL HODGE and FRANK B. VERMILYA, Esqs., for Relator.

WILLIAM P. BURR, WILLIAM J. CLARKE and LEONCE FULLER, Esqs. (John J. Delany, Esq., Corporation Counsel) for Respondents.

867

BISCHOFF, J.:

This is a motion for a peremptory writ of mandamus directing the respondent Commissioner of Water Supply, Gas and Electricity to grant a certain application made to him by the relator, The New York Electric Lines Company, for permission to construct subways or conduits beneath the surface of certain streets of the City, and further directing the respondents, Ahern and Haffen to approve the permit of the Commissioner, when issued, so far as that permit relates to streets in

868 *Exhibit F, Referred to in Affidavit of R. W. Bainbridge.*

the Borough of which each is, respectively, president.

The relator is a corporation organized in the month of October, 1882, under the General Telegraph Act (Laws of 1848, Chap. 263), "for the purpose of owning, conducting, using, maintaining and leasing lines of telegraph wires or other electric conductors for telegraphic or telephonic communication, and for electric illumination, to be placed under the pavements of the streets, avenues
869 and public highways of the City of New York and Brooklyn * * * and for the purpose of owning franchises for laying and operating the said lines of electric conductors."

On April 10th, 1883, the Board of Aldermen of the City of New York granted permission to the corporation to lay wires in and through the streets of the City, which privilege or license was accepted in writing, but no actual work of construction was ever begun and no wires have ever been lain by the corporation pursuant to the permission thus given.

870 It appears, however, that the company proceeded to procure the control of patents covering devices applicable to underground electric construction, that it maintained an office and factory, was engaged in the preparation of plans and designs and expended between $30,000 and $50,000 in preparatory and experimental work during the first year of its existence. On May 18th, 1883, the company filed in the office of the County Clerk a map showing the route of its proposed electrical conductors, and on July 31st, 1886, it applied to the Commissioner of Public Works for a permit to open the streets, the denial of which application.

871

upon the ground that the Commissioner was not the proper official to grant the permit, was followed by litigation, consistently unsuccesful, to enforce the company's asserted rights in the mater. The litigation ended in the year 1892, since which time nothing appears to have been done by the company excepting to resist two applications to the attorney general looking to the annulment of its charter, and excepting its payment of the annual taxes upon its corporate property and upon the assessed value of its corporate franchise.

872

On December 8th, 1905, this company, the relator, filed with the predecessor of the respondent commissioner applications for permits to open the streets, and certain discussion as to the relator's standing to demand the permit resulted. Finally, on May 11th, 1906, the Commissioner refused to permit upon the ground that "The New York Electric Lines Company has no valid franchise or rights in the City, nor has it a legal corporate existence." Upon this state of facts a writ of mandamus is applied for.

873

On behalf of the respondents, it is shown that on May 18th, 1906, the City, through a resolution adopted by the Board of Estimate and Apportionment, with the approval of the Mayor, declared its election to terminate and revoke the permission or privilege granted to the relator in the year 1883, to lay wires in and through the streets of the City, and it is contended that whatever rights the relator may have had, through its incorporation and the earlier grant of privileges, were lost through inaction, which, it is also claimed, terminated the existence of the corporation, without further pro-

874 *Exhibit F, Referred to in Affidavit of R. W. Bainbridge.*

ceedings, by the force of the statute (1 R. S. 600, Sect. 7).

This statute, in force when the relator was incorporated in 1882 provided: "If any corporation hereafter created by the legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease."

It is claimed for the respondents that this provision of the statute was self-executing (Brooklyn
875 &c. Co. vs. City of Brooklyn, 78 N. Y., 524; Re Brooklyn &c. Ry. Co., 72 id., 245) and, for argument, I may assume that it was, although the requirement to "organize and commence the transaction of its business" lacks much of the definite character of the conditions which were considered in the cases last cited, and is more closely within the rule of construction applied in Re Kings County Elevated R. R. Co. (105 N. Y., 97, 120) where it was held that a statute providing for the "release and forfeiture" of franchises of the corporation, upon default of certain conditions, was not
876 self-executing because the conditions were not defined by some specific fact as in the case referred to and which the Court distinguished.

It is quite apparent, however, that the relator did conform to the conditions of the statute, as expressed. It organized within one year and also commenced the transaction of its business, for it obtained a franchise from the City to lay wires underground, one of the purposes of its incorporation as stated in its charter. The Statute did not require that it should commence the work of construction of electrical subways, nor that it should undertake any particular endeavor; one step in the

877

transaction of its business, within the year, was a commencement, and, when obtaining a franchise from the City, it took that step and did commence the transaction of business.

The corporate life of the relator was not, therefore, brought to an end by the statute, and if its subsequent inaction was to affect its rights to exist, this was a question for the state to raise in direct proceedings for the annulment of the Charter (People vs. W. & D. R. R. Co. 128 N. Y., 240, 248).

878

So, too, it may be held that the franchise from the City, obtained by the relator in the year 1883, *was irrevocable by the City because not forfeited by any term* of the agreement itself (People vs. O'Brien, 111 N. Y., 1); but as I view the case, the application must be denied upon the ground that the *franchise was modified* by the State in the exercise of the police power, and that the *relator's individual right to open the streets for the laying of electrical conductors in conduits of its own has passed.*

879

By Chapter 499 of the Laws of 1885 there was provided a system for the regulation of underground electrical conduits, to be carried into effect by a board of commissioners of electrical subways, created by the act.

It was further provided that any persons or corporations desiring to lay wires underground in the streets of cities should, within sixty days after the passage of the act, submit to the board their plans for that purpose, and failing this, the commissioners were empowered to devise a ground subway, which all operators of electrical conductors under the streets should be found to use. That this regulation was a valid exercise of the police

power and thus to be upheld, notwithstanding its effect upon the contract rights existing by virtue of the relator's charter and the franchise from the city, has been settled by conclusive authority (People ex rel. N. Y. Electric Lines Co. vs. Squire, 14 Daly, 154; 107 N. Y. 593; 145 U. S., 175), and there is no provision in the subsequent statutes amending this "Subway Act" (Laws of 1886, Ch. 503; Laws of 1892, Ch. 263) which in any way removes the restriction to use the general subway,
881 devised and operated in this City.

The effect of the "Subway Act" was to give the relator sixty days in which to assert its right to lay its wires in its own conduits and thereafter it was in no better position than any other person or corporation for the purpose of a claim of right to open the streets and operate a private and individual system of its own.

This application is based upon the relator's franchise to lay wires under the streets, *and is not founded upon facts showing the failure of the respondent to provide sufficient general facilities for*
882 *the operation of electrical conductors. Indeed, the only facts presented upon this branch of the subject are contained in the respondents' papers and disclose the sufficiency of the present system to meet all requirements.*

As I have noted, the relator's franchise has been so modified by competent legislation that it cannot assert an individual right to operate its own subway system, and, this assumed right being the sole basis of the application before us, I must hold that the papers do not justify the granting of a writ of mandamus.

Motion denied with $10 costs.

June, 1906.

Exhibit F, Referred to in Affidavit of R. W. Bainbridge. 883

A Judicial Analysis.

June 29th, 1908.

Mr. D. A. Reynolds,

President Great Eastern Telephone Company.

Dear Sir:

In reply to your request for a clear statement of the scope and effect of the opinion and decision rendered by Mr. Justice Bischoff in the mandamus 884
proceedings, we write:

The peremptory mandamus was asked by us on behalf of the New York Electric Lines Company to compel the Commissioner of Water Supply, Gas and Electricity to issue permits to the Company that it might *build its own conduits in the streets for its wires.* The City resisted the mandamus, attacking the validity of the Company's charter and its franchise. The corporation counsel claimed that the Company *has no valid franchise or rights in the streets of the City, that it is without legal corporate existence*, and the Commissioner to 885
whom the application for a permit to open the streets was made by advice of the corporation counsel denied it for the following reason: "The New York Electric Lines Company has no valid franchise or rights in the streets of the City, nor has it a legal corporate existence." On behalf of the City the further claim was made before the Court that whatever franchise the Company ever had, had been revoked by a recent resolution of the Board of Estimate and Apportionment, passed in May, 1906, after the application of the Company had been filed with the Commissioner.

telephone conductors * * *. If at any time the space in such subway, conduits and ducts shall not be sufficient for all corporations or companies so applying for the same, or for the City of New York or any of its departments, the additional space needed shall be provided by the party of the second part at its own cost by the *construction*, maintenance, equipment and operation of *additional subways*. * * * All companies occupying space in said subways, conduits and ducts shall
893 own their own conductors and shall have the full management and control thereof, but such management and control shall be subject to the rights of all other occupants of said subways." The Subway Company has given a bond of $250,000 "securing the just and full performance of this contract, and the *building* or providing of said subways," and the statutes further provide that "if at any time, in the opinion of the parties of the first part (Subway Commission) or their successors, there shall be a substantial failure * * * the Mayor, Aldermen and Commonalty of the City of New
894 York may enter into possession of such conduits, etc."

The legal affairs of the Company have been conducted by Hon Alton B. Parker, former Chief Justice of this State; Hon. David B. Hill; Hon. Charles W. Dayton (since elected Supreme Court Judge); ex-Governor Frank S. Black's firm, including W. M. K. Olcott, Abraham Gruber and William H. Bonynge; J. Aspinwall Hodge, Frank B. Vermilya of this city and Tracy C. Becker, of Buffalo.

Exhibit F, Referred to in Affidavit of R. W. Bainbridge. 895

Decision, Court of Appeals.

New York Electric Lines Company.

The essential purpose of the relator's incorporation and of the permission acquired by it April 10th, 1883, was to lay electric conductors, and its rights in that respect have not been materially or essentially violated or impaired.

The only effect of the statutes and contracts made in pursuance thereof is to require that the 896
electric conductors to be laid by the relator shall be placed in conduits constructed in accordance with the general plan prepared in accordance with said statutes, instead of allowing the relator to construct its own subways or laying such electric conductors.

The rights of the relator have not in our judgment been impaired by said acts and contracts in any essential particular.

City's Attitude. 897

(BRIEF CORPORATION COUNSEL'S OFFICE, 1906).

"It is well to bear in mind that the present claim of relators is not the right to lay wires in subways, a right which no one disputes if exercised by an application to the discretion of the Commissioner of Water Supply, Gas and Electricity, but it is, on the contrary, an alleged right 'to construct subways or conduits beneath the surface of certain streets for the purpose of such construction work.'

898 (Papers on Appeal, fol. 4.) That is to say, the Company now claims exactly what it formerly claimed a right to do. There is no claim that relator has been refused permission to string its wires in the subways, or that there is lack of room for such wires therein. *If the subways of the Empire City Subway Company are not sufficient, means can readily be found for the construction of other subways.*"

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899 **Affidavit of Frank W. Conn, Read in Opposition to Motion.**

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

900 The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

State of New York, } ss.:
County of New York, }

Frank W. Conn, being duly sworn, says: In the years 1905 and 1906, I was Superintendent of the Long Island Division of The New York and New

Jersey Telephone Company and as such was familiar with the efforts made both by my Company and others to obtain applications for telephone service within the district under my charge as such Superintendent. During that time a number of solicitors of the Great Eastern Telephone Company approached a number of the subscribers to my Company in the section under my supervision to obtain from them applications for telephone service from the Great Eastern Telephone Company and submitted to such subscribers of my Company blank applications in the forms hereto attached, headed "Order for Telephone Service" and "Order for Residential Service" respectively, and marked "A" and "B," and a number of such blanks were filled in and signed by people living or doing business within the district under my supervision. These are the only forms that have ever been used by the Great Eastern Telephone Company so far as I know.

FRANK W. CONN.

Sworn to before me this
1st day of August, 1910.

LINCOLN JONES,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

Exhibit A, Referred to in Affidavit of Frank W Conn, Read in Opposition to Motion.

Brooklyn, N. Y.

This contract cannot be varied except by an officer of the Company in writing.

ORDER FOR RESIDENTIAL SERVICE

New York City, Oct. .....1905.

The Subscriber requests the GREAT EASTERN TELEPHONE COMPANY to place in.....

905 residence at..... one telephone instrument and to connect the same by .....metallic circuit with the Company's exchange in the Borough of Brooklyn, N. Y., maintain the same and furnish telephone service for the period of.....years from the date of connection with said exchange, and thereafter until this order is cancelled by one month's notice in writing from either party hereto, and agrees to pay therefor to said Company..... ($.....) dollars per year, payable monthly in advance, for the right to send an UNLIMITED number of messages per year.

906 In consideration of the placing of this order in advance of the construction of the system, the Company agrees that the Subscriber shall have the following benefits:

1. Six months' free service on the first ten thousand (10,000) telephones installed.

2. The subscriber is to have free use of the telephone installed under this order, for all local service until the Company shall be able to give connection with ten thousand (10,000) telephones.

3. The Company shall furnish the subscriber with local service at one-half above rates from the time

Exhibit A, Referred to in Affidavit of Frank W. Conn.

907

it can furnish telephonic connection with ten thousand (10,000) telephones until connection can be given with twenty thousand (20,000) telephones.

4. The Company agrees not to increase the price of service under this order during the time for which it is given, and to allow a discount of six (6) per cent. on orders for three or five years, on all classes of service amounting to $30 a year and upwards.

The Subscriber agrees to observe all reasonable regulations established by the Company, to use ordinary care in the use and protection of the telephone and other fixtures belonging to the Company upon the premises, and will afford such facilities upon premises as may be necessary for the Company to maintain such apparatus and connect the same with other subscribers and its central office.

908

This order becomes a contract, binding upon the Company, upon its acceptance by an officer of the Company, and a duplicate duly executed and mailed to the subscriber with postage prepaid, or left at his premises by the Company's verifier.

Solicited by LAWRENCE DRESCH,

909

Verified by .....

Dated of Installation .....190..

Name .....

Listing in Directory .....

Accepted by GREAT EASTERN TELEPHONE CO.

.....

Contract Agent.

Long-distance connection with 200,000 independent telephones guaranteed.

910 **Exhibit B, Referred to in Affidavit of Frank W. Conn, Read in Opposition to Motion.**

This contract cannot be varied except by an officer of the Company in writing.

ORDER FOR TELEPHONE SERVICE

The Subscriber requests the GREAT EASTERN TELEPHONE COMPANY to place in..... premises at ..... one telephone instrument and to connect the same
911 by.....metallic circuit with the Company's exchange in the Borough of..... .....maintain the same and furnish telephone service for the period of..... years from the date of connection with said exchange, and thereafter until this order is cancelled by one month's notice in writing from either party hereto, and agrees to pay therefor to said Company .....($.....) dollars per year, payable monthly in advance, for the right to send.....messages per year, and agrees to pay for such additional messages as may be used at the rate of.....cents per message, such
912 excess to be paid monthly at the end of each month and rebated where a lesser number of messages than those contracted for are used.

In consideration of the placing of this order in advance of the construction of the system, the Company agrees that Subscriber shall have the following benefits:

1. Six months' free service on the first ten thousand (10,000) telephones installed.

2. The Subscriber is to have free use of the telephone installed under this order, for all local ser-

913

vice until the Company shall be able to give connection with ten thousand (10,000) telephones.

3. The Company shall furnish the subscriber with local service at one (1) cent per message from the time it can furnish telephonic connection with ten thousand (10,000) telephones until connection can be given with twenty thousand (20,000) telephones.

4. The Company shall furnish the subscriber with local service at two (2) cents per message from the time it can furnish telephonic connection with twenty thousand (20,000) telephones until connection can be made with thirty thousand (30,000) telephones.

914

5. The Company shall furnish the subscriber with local service at three (3) cents per message from the time it can furnish telephonic connection with thirty thousand (30,000) telephones, until connection can be made with forty thousand (40,000) telephones; after which the full rate may be charged.

915

6. The Company agrees not to increase the price of service under this order during the time for which it is given, and to allow a discount of six (6) per cent on orders for three or five years, on all classes of service amounting to $30 a year and upwards.

The Subscriber agrees to observe all reasonable regulations established by the Company, to use ordinary care in the use and protection of the telephone and other fixtures belonging to the Company upon the premises, and will afford such facilities upon premises as may be necessary for the Company

to maintain such apparatus and connect the same with other subscribers and its central office.

This order becomes a contract, binding upon the Company, upon its acceptance by an officer of the Company, duly executed and mailed to the subscriber with postage prepaid, or left at his premises by the Company's verifier.

Solicited by .....

917 *Verified by* .....

Date of Installation.....190..

Name .....

Listing in Directory .....

Accepted by GREAT EASTERN TELEPHONE CO.

.....
Contract Agent.

918 Long-Distance connection with 200,000 independent telephones guaranteed.

Affidavit of Abraham L. Goldberg, Read in Opposition to Motion. 919

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited). 920

County of New York, ss.:

Abraham L. Goldberg, being duly sworn, says:

I reside at 77 West 119th Street, Borough of Manhattan, City of New York.

I made a search of Trow's copartnership and City directories of the Borough of Manhattan, City of New York, from the year 1884 down to and 921 including the year 1910, and find that the New York Electric Lines Company is stated in the directories to have been at the following places, in the following years:

1884	37 Wall Street
1885	"
1886	"
1887	280 Broadway
1888	11 Gold Street
1889	"
1890	"

1891	11 Gold Street
1892	"
1893	"
1894	"
1895	"
1896	"
1897	"
1898	"
1899	"
1900	"
1901	"
923 1902	"
1903	"
1904	170 Broadway
1905	"
1906	32 Broadway
1907	"
1908	"
1909	"
1910	30 Church Street

As to 37 Wall Street:

924 This building was formerly known as the Queen Building. I inquired of Mr. E. V. C. Eato, the superintendent of the building, for the period between 1880 and 1888, and he informed me that the New York Electric Lines Company never had an office or factory in the building during that period. His affidavit is herewith submitted.

As to 280 Broadway:

I learned that the New York Electric Lines Company never had an office in said building during the period from 1884 to date. The affidavit of Edward D. Harris, the superintendent of that building, is herewith submitted.

As to No. 11 Gold Street:

I found that the New York Electric Lines Company never had an office or factory at No. 11 Gold Street during the period from 1880 to 1907, as appears from the affidavits of William O. Ludlow and Frank A. Weeks herewith submitted.

As to No. 170 Broadway:

I was informed by Miss Agnes, in charge of the renting department of the real estate firm of De 926
Selding Bros., at No. 149 Broadway, which company had the renting of the building at No. 170 Broadway in 1904, 1905, that the New York Electric Lines Company never had an office there and never was a tenant.

On inquiry at No. 170 Broadway I learned from the superintendent that the New York Electric Lines Company never had an office there. Miss Agnes and the superintendent both declined to make any affidavit on my request.

As to No. 32 Broadway: 927

I was informed by the assistant superintendent of the building that the Great Eastern Telephone Company had an office in this building from 1907 to 1909; that the New York Electric Lines Company were never a tenant in the building.

The assistant superintendent further stated that he never had any dealings with the New York Electric Lines Company, the Great Eastern Telephone Company being the one holding the office, and it paid the rent.

The only force it had at No. 32 Broadway con-

sisted of a Mr. Reynolds and a relative of his, and one or two men and a few stenographers.

My informant declined to make any affidavit.

ALLEGED FACTORY ON GREENWICH ST. NEAR FULTON ST. :

As to the factory, which the moving affidavits state that the New York Electric Lines Company had on "Greenwich Street, near Fulton Street," I made inquiries throughout that neighborhood
929 and found that the New York Electric Lines Company never had a factory nor displayed a sign, as will more fully appear from the affidavit herewith submitted of Mr. Louis A. Laurencelle, who has been in business in the block between Fulton and Dey Streets on Greenwich Street for the past 27 years.

AS TO 1125 FLATBUSH AVENUE, BROOKLYN:

I made a further investigation to learn whether or not the Great Eastern Telephone Company ever had an office at 1125 Flatbush Avenue, in the Bor-
930 ough of Brooklyn, as appears from one of their printed circulars annexed hereto marked Exhibit 1, and I was informed by Mr. MacVeigh, in the office of Wood, Harmon & Co., that prior to the year 1907 this was vacant property; that it was and is owned by Wood, Harmon & Company, and that in the year 1907 Wood, Harmon & Company erected an apartment house with stores in it, which was completed in the spring of 1908. I inquired from Wood, Harmon & Company and from neighbors who have been there for the last 30 years, and was informed that the Great Eastern Telephone Company was never heard of nor never known of

931

there, as will more fully appear from the affidavits of Messrs. Briard and Miller herewith submitted.

I made a further search of the directory in the Borough of Brooklyn and found that from the years 1894 to 1899 George L. Weed and Wayne W. Wilson had an office at No. 375 Fulton Street, Borough of Brooklyn, and I learned from the superintendent of the building there that they acted as agents and brokers for the United States Guarantee Company of New York, and the United States Guarantee Company paid the rent for that office.

932

Later in the year 1899, the said Weed and Wilson were agents for the Empire State Surety Company of Brooklyn, at the same address, which company also paid the rent of the office. At this address there never was any telephone or telegraphic business carried on, and the superintendent never heard of any such company or business.

I searched the records of Kings County and find that in the petition of George L. Weed for letters of administration on the goods, chattels and credits of Sidney F. Shelbourne, who died November 9, 1887, it appears that Shelbourne changed his name from Schoonmaker about 20 years prior to 1887.

933

That it further appears in the petition that Shelbourne died possessed of certain personal property, the value of which did not exceed the sum of $500. No accounting has been filed.

I also searched the records and find that in October 16, 1887, George L. Weed brought an action in the Supreme Court for Kings County against George M. Riley, James S. White and Charles J. Warren, and that the same was discontinued by consent March 3, 1903. No papers are on file except undertakings on injunction and consent to

934 order of discontinuance. The facts relating to this action more fully appear in the affidavit of Henry Hudson herewith submitted.

No statement has been filed in the office of the Secretary of State of New York by the Great Eastern Telephone Company of South Dakota, which is required to enable it to do business in this State, as appears from the annexed certificate of the Secretary of State marked Exhibit A.

I have personally examined the annual report filed by the New York Electric Lines Company in
935 the office of the Clerk of the County of New York on the 18th day of January, 1901, and the following statement appears therein:

> "*The existing assets of said corporation amount to at least the sum of*
> The value thereof is undetermined by reason of the fact that they consist of a certain franchise which the said company has as yet been unable to use, and certain patents in same condition."

936 I have also personally examined the annual report filed by the New York Electric Lines Company in the office of the Clerk of the County of New York on the 20th day of January, 1902, and it is stated therein that

> "*The amount of its assets at least equals the sum of* twenty-five hundred *dollars,* and a contested franchise."

Said annual reports are made out on printed stationers' blanks. The words that are underlined as above set forth are printed in the blank form. The

937

remaining words quoted are filled in on the blanks in handwriting.

The first of the reports above referred to, filed on the 18th day of January, 1901, was made by Jesse Larrabee and George L. Weed, two of the persons who make affidavits in support of the present application, and were acknowledged before Wayne W. Wilson as a notary public, the said Wayne W. Wilson being the person making the principal affidavit in support of this application.

The report filed on the 20th day of January, 1902, is signed by George L. Weed as Secretary and Treasurer of the New York Electric Lines Company, and by no one else, and is not acknowledged or sworn to by him or by any other officer or director of the New York Electric Lines Company.

938

ABRAHAM L. GOLDBERG.

Sworn to before me this 1st
day of August, 1910.

NEWTON T. CULLEN,
Notary Public,
N. Y. Co.

939

940 **Affidavit of Edward V. C. Eato, Read in Opposition to Motion.**

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Application of THE NEW
941 YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

County of New York, ss.:

Edward V. C. Eato being duly sworn says:

I reside at No. 663-A President Street, Borough of Brooklyn, City of New York.

Between the years 1880 and 1888 I was superintendent of the building known as the Queen
942 Building, situated at No. 37 Wall Street, in the Borough of Manhattan, City of New York.

The New York Electric Lines Company never had an office in the building to my knowledge, and if they had I would have known it.

EDWARD V. C. EATO.

Sworn to before me this
25th day of July, 1910.

HENRY HUDSON,
Notary Public,
New York County.

Affidavit of Edward D. Harris, Read in Opposition to Motion.

943

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

944

County of New York, ss.:

Edward D. Harris being duly sworn says:

I reside at No. 224 Palisade Avenue in the City of Yonkers, State of New York. I have been superintendent of the building known as the Stewart Building at No. 280 Broadway in the Borough of Manhattan, City of New York, from the year 1884 to the present date. During all this time the New York Electric Lines Company never had an office in the building. I had charge of the renting and tenants of the building, and if the New York Electric Lines Company had ever had an office in the building I would have known it.

945

EDW. D. HARRIS.

Sworn to before me this
26th day of July, 1910.

HENRY HUDSON,
Notary Public,
N. Y. Co.

946 **Affidavit of Frank A. Weeks, Read in Opposition to Motion.**

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

947

County of New York, ss.:

I, Frank A. Weeks, being duly sworn, depose and say:

I am engaged in the business of wholesale stationer at No. 93 John Street, in the Borough of Manhattan, City of New York.

948 The business to which I have succeeded was formerly conducted in the name of A. A. Weeks and the A. A. Weeks Manufacturing Company. While the business was under the name of A. A. Weeks (my father) it was located at No. 11 Gold Street, in the Borough of Manhattan, City of New York, from 1886 occupying the entire building, excepting the store, under a sublease from Weed & Becker Mfg. Co. who were engaged in the paper and twine business and who were also agents from an axle concern in Connecticut. About 1889 this latter firm was changed to Weed, Riley & Company. The sublease continued up to about the year 1900. The

Weed of Weed, Riley & Co. was George L. Weed.

In the year 1900, as the lease of Weed, Riley & Co. was just about to expire, I secured from the Wendall Estate a lease upon the entire building, 11 Gold Street, subletting the store upon the ground floor to Messrs. Weed, Riley & Co. at a rental of Sixty Dollars ($60) per month. Weed, Riley & Co. left the building in the latter part of the year 1904.

The two firms of A. A. Weeks and Weed, Riley & Co. were the only people who occupied this building from the time that I came there in 1886 up to the year 1907, and we were there alone the last two 951 years. During all that time the New York Electric Lines Company had no office whatsoever there and no sign or display with the name of that company upon it, and the name of such company was never spoken of in any connection with the business. There never was any telegraph or telephone company in that building to my knowledge between 1886 and 1907.

I visited the store and office conducted by Weed, Riley & Co. and their previous firm at No. 11 Gold Street almost every day, since we had to go through their store to get into the cellar where we kept our 951 goods stored, and I never saw or heard of any business carried on in that portion of the building except that of paper and twine. The only persons who were engaged in the firm of Weed, Riley & Co. were Mr. George L. Weed and Mr. Riley and another, and the paper and twine salesman whom they had. There was no other office help there so far as I know.

After Weed, Riley & Co. left we continued to occupy the entire building up to the year 1907, when we moved to the premises No. 354 Broadway, and thereafter to our present premises.

952 On leaving we sublet the entire building No. 11 Gold Street to the firm of Messrs. Reed & Halladay.

During all the time that I was with my father (who is now dead) at No. 11 Gold Street from 1886 no fire took place at those premises; but on one occasion there was some water damage caused by a fire which took place in a building on William Street in the rear. The only damage done by that happened in the cellar of 11 Gold Street which we used for the storage of our goods. That damage was done by water, no fire spreading into our build-
953 ing, nor do I know of any water or fire damage occurring in that portion occupied by Weed, Riley & Co. My concern was the only one that put in any fire insurance claim.

I met Mr. Weed upon the street about six months ago and asked him what he was doing, and he told me that he was at that time private secretary to a naval officer.

FRANK A. WEEKS.

Sworn to before me this
954 21st day of July, 1910.

JOHN B. B. FISKE,
Notary Public,
New York County.

Affidavit of William O. Ludlow, Read in Opposition to Motion. 955

N. Y. SUPREME COURT.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited). 956

State of New York, County of New York, } ss.:

William O. Ludlow, being duly sworn, deposes and says, that he has been the agent and in the employ of John C. Wendel for over thirty years; and has had charge of the books and papers of the said John G. Wendel during said period of time. That John G. Wendel is the landlord of the premises number 11 Gold Street, in the Borough of 957 Manhattan, City of New York, and was the landlord of said premises between May 1st, 1880, and May 1st, 1904; that said premises were leased to Weed & Becker Manufacturing Company, by agreement dated February 20th, 1880, for the term of three years from the 1st day of May, 1880, and that said lease was renewed for three years from the first day of May, 1883, to the said Weed & Becker Manufacturing Company, and again renewed for three years from the first day of May, 1886, to the said Weed & Becker Manufacturing Company. That said premises were thereafter leased to Henry

958 F. Weed, Charles Riley and Mary E. Weed, comprising the firm of Weed, Riley & Co., by agreement dated January 15th, 1889, for the term of three years from May 1st, 1889.

Deponent further says that said premises were thereafter leased to Henry F. Weeks and Agnes Riley for the term of three years from May 1st, 1901.

Deponent further says that he has received rent under the aforesaid leases from the aforesaid named tenants during the terms of the said leases.

959 Deponent further says that the said premises were never leased by John G. Wendel to the New York Electric Lines Company nor to any other telephone or telegraph company during the period from May 1st, 1880, to May 1st, 1904.

(Signed) W. O. LUDLOW.

Sworn to before me this
27th day of July, 1910.

BINLOCH E. RABELL,
Notary Public, Westchester Co.

960 Certificate filed in New York Co.

Affidavit of Louis A. Laurencelle, Read in Opposition to Motion. 961

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited). 962

County of New York, ss.:

Louis A. Laurencelle being duly sworn says:

I am in business as a dealer in paper and twine at No. 195 Greenwich Street, near the corner of Fulton Street and have been at that place for the past twenty-seven years.

I am fairly well acquainted with all the businesses which are in existence in that particular point in Greenwich Street, and I have never known of any telephone or telegraph company or any manufactory of instruments or appliances or like for a telephone or telegraph company to be situated in that immediate neighborhood during the time that I have been in business there, and I have never heard at any time of the New York Electric Lines Company having its business or factory at that point, nor have I ever seen any sign or notice or any display on any doorway or window in that locality indicating that such company had its business of- 963

fice or any factory or establishment at that part of the city.

L. A. LAURENCELLE.

Sworn to before me this
21st day of July, 1910.

JOHN B. B. FISKE,
Notary Public,
New York County.

965

Exhibit A, Annexed to Affidavit of A. L. Goldberg, Read in Opposition to Motion.

STATE OF NEW YORK.

OFFICE OF THE SECRETARY OF STATE.

Albany, July 23, 1910.

966 I hereby certify that I have made diligent examination in this office for a statement under section 16 of the General Corporation Law and a designation by the GREAT EASTERN TELEPHONE COMPANY, of a person upon whom summons may be served in this State, pursuant to Section 432 of the Code of Civil Procedure (the custody of such Designation, if any such there be, legally belonging to me), and that upon such examination I find no such Statement or Designation by said Corporation on file in this Office, and that no certificate of authority under Section 15 of the General Corpora-

tion Law has been issued to the above named Corporation by this Office.

WITNESS my hand and the seal of Office of the Secretary of State, at the City (Seal). of Albany, the day and year first above written.

SAMUEL S. KOENIG,
Secretary of State.

968

Exhibit 1, Annexed to Affidavit of A. L. Goldberg, Read in Opposition to Motion.

A TELEPHONE IN EVERY RESIDENCE IN FLATBUSH:

Is the aim of the Flatbush Managament for the

GREAT EASTERN TELEPHONE COMPANY.

969

WHY NOT, when you can talk as often as you like to your friends and business men, for one dollar a month, and into adjoining boroughs for five cents a message?

LOOK AT THESE RATES:

Unlimited Residential Telephones from $1.00 a month.
8-Party Line, $12 a year 2-Party Line, $30 a year.
4-Party Line, $18 a year Private Line, $48 a year.

970 *Exhibit 1, Annexed to Affidavit of A. L. Goldberg.*

Lowest Business Message Rate, 2 cents.
4-Party Line Business Telephones from $1.00 a month.
2-Party Line Business Telephones from $1.25 a month.
Private Line Business Telephones from $1.66 a month.
(Party lines operated with absolute secrecy by means of the Reynolds Multiplex Telephone System, secured by four broad patents).

971 CONSIDER THE ABSURDITY OF PRESENT CONDITIONS:

Brooklyn to Bath Beach, by rail, 5c.; by Telephone 15c.
Battery to the Bronx, by rail, 5c.; by Telephone 20c.
Manhattan to Jersey City, by ferry, 3c. by Telephone 15c.

PERUSE THE ACCOMPANYING CONTRACT:

and either fill out and mail the same to us, or request a call from the Flatbush representative of the company who will give a satisfactory and conclusive answer to every question that may be raised.

972

SIX MONTHS' FREE SERVICE TO THE FIRST 10,000 SUBSCRIBERS CONNECTED.

The difference between our rates and those charged at the present time will insure an annul saving to the citizens of New York City of over $3,000,000.

GREAT EASTERN TELEPHONE COMPANY,

32 Broadway, New York City.

1125 Flatbush Avenue, Brooklyn, N. Y.

Affidavit of William H. Miller, Read in Opposition to Motion.

973

NEW YORK SUPREME COURT,

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

974

City and State of New York, } ss.:
County of New York, }

William H. Miller, being duly sworn, says:

I reside at 158 96th Street, in the Borough of Brooklyn, City of New York. I have charge of buildings in the course of erection for Wood, Harmon & Company, and have been engaged as such since the year 1904.

In the year 1907 I superintended the erection of the building by Wood, Harmon & Company at No. 1125 Flatbush Avenue in the Borough of Brooklyn. 975
This building was completed about the Spring of 1908. At the time I took possession of this property for the erection of building mentioned above, there was no building on the land, it being vacant.

WM. H. MILLER.

Sworn to before me this
26th day of July, 1910.

ELIZABETH ROTH,
Commissioner of Deeds,
in and for New York City.

976 **Affidavit of Gilbert F. Briard, Read in Opposition to Motion.**

NEW YORK SUPREME COURT.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY
977 SUBWAY COMPANY (Limited).

State of New York, }
County of New York, } ss.:

Gilbert E. Briard, being duly sworn, says:

I reside at 703 Sterling Place, Borough of Brooklyn, City of New York. I have charge of the collecting of the rents for Wood, Harmon & Company in the Borough of Brooklyn, and have been engaged as such since the year 1904.

In the Spring of 1908 Wood, Harmon & Company completed the erection of their building at No. 1123
978 Flatbush Avenue in the Borough of Brooklyn, and immediately I took charge of the renting and collecting of the rents.

At no time from the time that we erected the building down to the present day did the Great Eastern Telephone Company have an office there, nor did they ever, at any time, pay any rent to the said Wood, Harmon & Company, nor did I ever hear of any such; and if they did have it I surely would have known it.

GILBERT E. BRIARD.

Sworn to before me this
26th day of July, 1910.

ELIZABETH ROTH,
Commissioner of Deeds,
in and for New York City.

Affidavit of Henry Hudson, Read in Opposition to Motion. 979

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited). 980

County of New York, ss.:

Henry Hudson, being duly sworn, says:

That he is a clerk in the office of Blandy, Mooney & Shipman, attorneys for the Empire City Subway Company (Limited) in the above entitled proceeding.

That he has examined the files of the Clerk of the 981
County of Kings for all papers filed in said office in connection with the action brought in the Supreme Court, Kings County, entitled "George L. Weed, Plaintiff, against George M. Riley, James S. White and Charles J. Warren, Defendants." That the only papers that deponent found on file in connection with said action were three undertakings on injunction, the first of which was filed on October 13, 1899, and the other two on the 19th day of October, 1899, and a consent and order of discontinuance as to the defendant Riley, filed on the 4th

982 day of January, 1900, and a consent and order of discontinuance as to all defendants, filed on the 3rd day of March, 1900. That deponent obtained from Robert Stewart, attorney for the defendants James S. White and Charles J. Warren, a copy of the summons and complaint in said action and an affidavit of George L. Weed therein, verified on the 13th day of October, 1899, and deponent annexes the same hereto, marked Exhibit 1 and Exhibit 2. That the statements contained in said complaint and affidavit are inconsistent with the statements in
983 the affidavit of George L. Weed, made in the above entitled proceeding, as will appear on a comparison thereof.

HENRY HUDSON.

Sworn to before me this
1st day of August, 1910.

HERBERT L. SEWARD,
Notary Public, Kings County,
Certificate filed in New York County.

984

Exhibit 1, Referred to in Affidavit of Henry Hudson, Read in Opposition to Motion. 985

NEW YORK SUPREME COURT,

COUNTY OF KINGS.

GEORGE L. WEED,
Plaintiff,
against
GEORGE M. RILEY, JAMES S. WHITE and CHARLES J. WARREN,
Defendants. 986

Upon the affidavit of George L. Weed, the plaintiff in the above entitled action, duly verified on the 13th day of October, 1899, and the affidavit of Charles J. Warren, duly verified on the 5th day of October, 1899, and upon the complaint in this action duly verified on the 13th day of October, 1899, all of which are hereto annexed, and upon all 987 of the pleadings and proceedings herein, NOW on motion of B. F. Chadsey, attorney for the plaintiff, it is hereby

ORDERED that the defendants above named show cause before me at a Special Term of this Court for the hearing of litigated motions to be held at the Court-House in the Borough of Brooklyn and City of New York on the 19th day of October, 1899, at the opening of Court or as soon thereafter as counsel can be heard, why the said defendant, GEORGE M. RILEY, his agents and ser-

988 vants, should not be enjoined, forbidden and restrained from parting with, disposing of, encumbering or in any wise dealing with the thirteen thousand two hundred (13,200) shares of the capital stock of the corporation, namely The New York Electric Lines Company, conveyed to and deposited with the said defendant, RILEY, by this plaintiff, as alleged in his complaint, during the pendency of this action and until the final determination thereof and that why during the pendency of this action
989 and until its final termination some suitable person should not be appointed as receiver to hold the certificates of stock aforesaid to await the final determination of this action and further order of this Court, and why the plaintiff should not have all such other and further order or relief in the premises as to the Court shall seem just and proper, and it is further

ORDERED that the said defendant, GEORGE M. RILEY, his agents and servants and all those acting under or through him, be and they are hereby enjoined, forbidden and restrained until the
990 hearing and decision of this application and a decision upon this motion, from selling, parting with, disposing of, encumbering or in any wise dealing with the thirteen thousand two hundred (13,200) shares of the capital stock of the corporation, The New York Electric Lines Company, conveyed to and deposited with the said defendant, RILEY, by this plaintiff as alleged in the complaint which is hereto annexed, and it is further

ORDERED that copies of this order and of the said annexed affidavits and papers upon which it is

Exhibit 2. Referred to in Affidavit of Henry Hudson 991

granted, be served upon the defendants on or before the 16th day of October, 1899.

Dated, at the Court-House, Borough of Brooklyn, City of New York on the 13th day of October, 1899.

WILLIAM D. DICKEY.
J. S. C.

Exhibit 2, Referred to in Affidavit of Henry Hudson, Read in Opposition to Motion. 992

NEW YORK SUPREME COURT,

COUNTY OF KINGS.

GEORGE L. WEED,
Plaintiff,

against

GEORGE M. RILEY, JAMES S. WHITE and CHARLES J. WARREN,
Defendants. 993

State of New York,
County of Kings,
Borough of Brooklyn, } ss.:

George L. Weed, being duly sworn, deposes and says that he is plaintiff in the above entitled action; that this action is brought for the purpose of re-

994 *Exhibit 2, Referred to in Affidavit of Henry Hudson*

covering thirteen thousand two hundred (13,200) shares of the capital stock of the corporation, The New York Electric Lines Company, and for all of the relief demanded in the complaint herein, a copy of which is hereto annexed; deponent further says that in th month of August, 1892, while he, the plaintiff, and the said defendants, George M. Riley, James S. White and Charles J. Warren were the owners of certain shares of stock in the said New York Electric Lines Company, the defendant,
995 George M. Riley, proposed to deponent and to the said White and Warren that if they, said deponent, White and Warren, should each assign, convey, transfer and deliver to the defendant, George M. Riley, certain portions of their respective holdings of stock in said corporation, which taken together with the shares held by the said George M. Riley would vest in the said defendant, Riley, the controlling interest of the stock in said corporation and clothe him with all the powers incidental thereto; that he, Riley, would immediately employ counsel, pay all expenses, and commence any and all actions necessary to test the questions in dispute between
996 the said New York Electric Lines Company and other competing companies or the authorities of the City of New York, and in the event of his failure so to do, he would return or re-convey the said stock to deponent and to the defendants, White and Warren, on demand. Said Riley said to deponent and to said White and Warren in effect "Now, gentlemen, if you will go ahead and each of you turn over to me enough of your stock to give me a controlling interest, I will go ahead at once, get a lawyer, Jerry Wernberg, my brother-in-law, pay all of the expenses, commence an action right away and

Exhibit 2, Referred to in Affidavit of Henry Hudson 997

fight the thing through and win and defray the expenses with the stock." Deponent said to Riley "Now, will you do this at once?" Riley replied "I will, and if I don't and you gentlemen are not satisfied with what I am doing, I will give you back your stock whenever you want it." Deponent further says that by reason of this assurance and promise upon the part of Riley, he assigned and conveyed to him thirteen thousand two hundred (13,200) shares of stock in said Company; that thereafter the defendants, White and Warren, 998 assigned to the said Riley certain shares of their stock in said Company, whereby he became vested with a controlling interest of the stock of said Company; that many times subsequent to this transaction, deponent has met the said Riley and inquired of him what progress he was making, and for some considerable time said Riley assured deponent that he was progressing as rapidly as possible, and deponent relying upon such statements and representations and believing the statements of the said Riley, was satisfied that said Riley, as he stated, was doing all that he could; deponent further says that 999 the said Riley never commenced any action or actions or has never instituted any proceeding or proceedings whatsoever against any person or corporation or against any of the authorities of the City of New York for the purpose of testing the franchise of the said New York Electric Lines Company, described in the complaint herein; that of late the said Riley has positively refused to give deponent any information as to the progress he was making or had made and of late has repudiated entirely the agreement above set forth, and refused

1000 *Exhibit 2, Referred to in Affidavit of Henry Hudson*

to recognize his trust; deponent says that on the 11th day of September, 1899, he visited said defendant, Riley, at his office #11 Gold Street in the Borough of Manhattan and City of New York, and that he did then and there duly demand of the defendant, Riley, the return of his stock; that the said Riley refused to return and reconvey the same and that deponent then stated to the said defendant, Riley, that he would recover his stock by law, whereupon Riley said to deponent "If you make any such
1001 attempt, I will put the stock in such a condition that you never will get a hold of it;" that the said Riley also threatened deponent that he would dispose of the stock; that from the information possessed by deponent and received from various individuals, one of whom is Charles J. Warren, whose affidavit is hereto annexed, deponent verily believes that the said Riley will carry his threat into execution and dispose of all of deponent's stock at the earliest opportunity; deponent believes that the said stock is valuable and that the said Riley can find a market for the same; that the ground for deponent's belief is
1002 that the said defendant, Riley, has told deponent that he could sell it; that deponent has no adequate remedy at law for the recovery of his said stock; that he can not replevin the same for the reason that said stock is in the possession of said Riley, but how or where, deponent has no knowledge; that the only way that deponent's rights can be fully protected in this action is by an injunction restraining the said defendant, Riley, from making any disposition of said stock during the pendency of this action and for the appointment of a receiver to hold the certificates of stock aforesaid to await the final determination of this action and further order of

Exhibit 2. Referred to in Affidavit of Henry Hudson

1003

this Court with reference thereto; that no previous application has been made herein for an injunction order or for an order to show cause why an injunction should not be granted herein, or for an order appointing a receiver herein, or for the order herein applied for; that the reason why an eight days' notice of motion for the same is impracticable herein is that the said defendant, Riley, may dispose of the said shares of stock and defeat deponent's rights.

1004

GEO. L. WEED.

Sworn to before me this
13th day of October, 1899.

W. M. TOMLINS, JR.,
Commissioner of Deeds,
The City of New York,
Residing in the Borough of Brooklyn.

1005

1006 **Affidavit of Charles J. Warren, Attached to the Affidavit of Henry Hudson, Read in Opposition to Motion.**

NEW YORK SUPREME COURT,

COUNTY OF KINGS.

GEORGE L. WEED,
Plaintiff,

against

1007

GEORGE M. RILEY,
Defendant.

Charles J. Warren, being duly sworn, deposes and says that he resides at #1577 Atlantic Avenue in the Borough of Brooklyn, County of Kings, City and State of New York, and that he is and has been for a number of years well acquainted with both the plaintiff and defendant in this action; that on or about the 11th day of September, 1899, the defendant above named said to deponent the following
1008 words: "If George (meaning this plaintiff) made any attempt to recover this stock, I would dispose of it in such a manner whereby he (meaning this plaintiff) never will find it;" and that said defendant did upon said date in the presence of deponent tell said plaintiff the same thing.

CHARLES J. WARREN.

Sworn to before me this
5th day of October, 1899.

W. M. TOMLINS, JR.,
Commissioner of Deeds,
The City of New York,
Residing in the Borough of Brooklyn.

Summons With Notice, Complaint Attached to Affidavit of Henry Hudson, Read in Opposition to Motion. 1009

N. Y. SUPREME COURT,

COUNTY OF KINGS.

GEORGE L. WEED,
Plaintiff,

against

GEORGE M. RILEY, JAMES S. WHITE and CHARLES J. WARREN,
Defendants. 1010

To the above-named defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint. The plaintiff desires the trial of this action in the County of Kings, N. Y. 1011

Dated, Brooklyn, N. Y., October 13, 1899.

B. F. CHARDSEY,
Plaintiff's Attorney,
Office and Post Office Address,
No. 375 Fulton Street,
Borough of Brooklyn, N. Y.
Telephone, 589 Main.

1012 SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF KINGS.

GEORGE L. WEED,
Plaintiff,

against

GEORGE M. RILEY, JAMES S. WHITE and CHARLES J.
1013 WARREN,
Defendants.

FIRST.—That at all of the times hereinafter mentioned "The New York Electric Lines Company" was and now is a domestic corporation, duly created by and existing under and by virtue of the laws of the State of New York.

SECOND.—That in the month of August, 1892, each of the parties was and each now is a stockholder in the said corporation, the plaintiff herein
1014 being then the owner and holder of twenty-six thousand (26,000) shares of its capital stock, of the par value of One hundred Dollars each, the same being fully paid and non-assessable.

THIRD.—That the said corporation, The New York Electric Lines Company, then owned and possessed and now owns and possesses a valuable franchise acquired from the Mayor, Aldermen and Commonalty of the City of New York, securing to it the said The New York Electric Lines Company the right, privilege and permission to lay wires or

other conductors of electricity in and through the streets, avenues and highways of the said City and to build and maintain the necessary vaults, test boxes, distribution conduits, &c. underground and the necessary means of distribution and connection above ground, together with other rights and privileges as more fully appears from the original enactment of the Common Council of the said City of New York, to which reference is hereby made. 1015

FOURTH.—That the said franchise constituted and now constitutes the most valuable asset of the said corporation, The New York Electric Lines Company. 1016

FIFTH.—That prior to the said month of August, 1892, divers differences, doubts and disputes arose between the said The New York Electric Lines Company and various competing firms and corporations organized for a similar or kindred purpose touching the scope, character, validity, value and infringement of the said franchise, whereby the rights to it secured were invaded and the value of the capital stock of the said The New York Electric Lines Company was seriously impaired and jeopardized and this plaintiff, together with the various defendants herein were threatened with great loss and damage as a result thereof, whereupon, for the protection and preservation of its said property and to conserve the same, it became necessary for the said corporation, The New York Electric Lines Company, to assert its rights and privileges in the premises, and by legal process to reduce the same to possession and enjoyment; to which end, and for the purpose of facilitating such action or actions as might upon due deliberation be initiated, it was, by all the parties to this action, deemed desirable to vest in some one person a controlling interest in 1017

1018 the said corporation in order that the conduct and policy of such effort or litigation as should be instituted in the premises, might be consistent and untrammelled by diversity of opinion, or delayed by the necessity of frequent consultation.

SIXTH.—That in contemplation of the facts, circumstances, mutual interests and common dangers aforesaid, the parties to this action entered into an agreement in the said month of August, 1892, whereby it was agreed that this plaintiff and the defendants, James S. White and Charles J. Warren
1019 should each convey, transfer and deliver to the defendant, George M. Riley, such proportion of their respective holdings in the said corporation, The New York Electric Lines Company, as taken together with the number of shares of stock held and owned by the said George M. Riley, would constituted him, the said George M. Riley, the holder of record of a controlling interest in the said corporation and clothe him with all the powers incidental thereto; and whereby it was further agreed that the said defendant, George M. Riley, would forthwith, if practicable, through proper attorney or attorneys institute such action or actions, proceeding or pro-
1020 ceedings at law or in equity as would test the various questions in dispute as aforesaid, and that he would conduct the same to a final determination, defraying the expense thereof with the said stock, and that in the event of his failure so to do, or in the event of an unsuccessful termination of such litigation and effort as might by him be instituted, he would re-convey, re-assign and deliver all of the stock thus, as aforesaid, deposited with him, to the respective owners thereof, including this plaintiff.

SEVENTH.—That in pursuance of the said agreement this plaintiff did in the said month of August,

1892, duly assign, convey and deliver to the said defendant, Riley, thirteen thousand, two hundred shares of the capital stock of the corporation, The New York Electric Lines Company, and the same was duly transferred to him upon the books of the said corporation. 1021

EIGHTH.—That the defendants, James S. White and Charles J. Warren, and each of them did in pursuance of the said agreement thereafter convey, assign and deliver to the said defendant, George M. Riley, certain of the shares of the capital stock of said corporation by them owned respectively, and the same was duly transferred to him upon the books of the said corporation. 1022

NINTH.—That the said defendant, George M. Riley, in pursuance of the said agreement, was vested and clothed with a controlling interest in said corporation and accepted the said shares of capital stock from this plaintiff and from the defendants James S. White and Charles J. Warren in trust and as trustees in pursuance of the said agreement and for the uses and purposes hereinbefore expressed.

1023

TENTH.—That the said defendant, George M. Riley, failed, neglected and refused to perform his said contract or to execute his said trust or any portion thereof and has not instituted or caused to be instituted any proceeding or action whatsoever in the premises, and no adjudication or determination of the issues hereinbefore referred to has ever been by him on his behalf sought or obtained.

ELEVENTH.—That this plaintiff has performed all the covenants and conditions of said agreement on his part agreed to be performed.

1024 TWELFTH.—That this plaintiff has inquired from and demanded of the defendant, George M. Riley, what, if any, effort he was making or had made in the premises and the said defendant, George M. Riley, declined and refused to inform plaintiff.

THIRTEENTH.—That heretofore and before the commencement of this action, the plaintiff demanded of the said defendant, George M. Riley, that he account to him in the premises and state what amount, if any, of the said stock had been consumed or utilized by him for or on behalf of this plaintiff
1025 or in furtherance of the trust in him created as aforesaid, and the said defendant, George M. Riley, declined and refused so to do or in any wise to recognize his trust or obligation in the premises.

FOURTEENTH.—That on the 11th day of September, 1898, the plaintiff duly demanded from the said defendant, George M. Riley, that he return, re-convey, re-assign and deliver to him, the said plaintiff, all of the shares of the capital stock of the corporation, The New York Electric Lines Company, transferred to and deposited with him in trust and as trustee aforesaid, and the said defend-
1026 ant, George M. Riley, then and there refused so to do.

FIFTEENTH.—That the said defendant, George M. Riley, has threatened and now threatens to so encumber or dispose of the capital stock of the corporation, The New York Electric Lines Company, deposited with and held by him in trust and as trustee as aforesaid, that no process of this Court will reach the same, and that this plaintiff will be without adequate remedy in the premises.

SIXTEENTH.—That by reason of the said wrongful acts of the defendant, George M. Riley, and his

failure to perform his said contract and to execute and administer his trust created as aforesaid, the rights and privileges of the said corporation, The New York Electric Lines Company, and the franchise acquired as aforesaid, have been and now are greatly jeopardized, depreciated and endangered, and by further delay in the premises or a continuance of the existing conditions, the same and the interests and investments of this plaintiff will be irreparably injured. 1027

WHEREFORE the plaintiff prays that it may be ordered, adjudged and decreed herein

1. That the defendant, George M. Riley, holds thirteen thousand, two hundred (13,200) shares of the capital stock of the corporation, The New York Electric Lines Company, in trust and as trustee for this plaintiff. 1028

2. That this plaintiff is the sole owner thereof and that the defendant, George M. Riley, be directed to re-convey, re-assign and deliver the same to him.

3. That the said trust be in all respects terminated as to this plaintiff, and the defendant, George M. Riley, directed to account to him in the premises. 1029

4. That during the pendency of this action and until the final determination thereof the defendant, George M. Riley, be enjoined, forbidden and restrained from parting with, disposing of, encumbering or in any wise dealing with the thirteen thousand, two hundred (13,200) shares of capital stock of the corporation, The New York Electric Lines Company, conveyed to and deposited with him by this plaintiff as herein alleged.

1030 5. That during the pendency of this action and until its final termination that some suitable person be appointed as Receiver to hold the certificates of stock aforesaid to await the final termination of this action and the further order of this Court with reference thereto.

6. That the rights and equities of the parties hereto be ascertained and determined with reference to the trust created in the defendant, George M. Riley, and by him accepted, and that this plaintiff have such proper order, judgment or decree and relief in the premises as he may show himself
1031 entitled to receive and as to the Court may seem meet and just in the premises and for all of his costs and disbursements in this action.

B. F. CHADSEY,
Plaintiff's Attorney,
Office & Post-Office Address,
375 Fulton Street,
Borough of Brooklyn,
City of New York.

1032

Affidavit of Edmund L. Mooney, Read in Opposition to Motion. 1033

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited). 1034

County of New York, ss.:

I, Edmund L. Mooney, being duly sworn, say:

I have been retained by the Empire City Subway Company (Limited) as counsel in the above entitled proceeding and to make the argument in its behalf on the hearing.

The papers were served on the Empire City Subway Company (Limited) on the 1st day of July, 1910, and were transmitted to me on that day. 1035

The moving papers consist of 109 typewritten pages and cover the entire corporate existence of the New York Electric Lines Company for over a quarter of a century, including its alleged inventions, finances, litigations, contractual relations, taxation, and numberless other features. Its litigations, which have gone on two occasions through our Court of Appeals to the Supreme Court of the United States, are referred to at length in the moving papers. I have had to read and have read dur-

1036 ing the period above mentioned thousands of pages of printed matter and records, all of which relate to the matter set forth in the moving papers, and have had to conduct and have conducted inquiries and investigations as to numerous facts set forth in the moving papers, none of which are within my own knowledge or information, and, I am advised by the officials of the Empire City Subway Company (Limited), are not within their knowledge or information.

1037 I have prepared during the above period, motion papers on three motions: (1) to strike out the affidavits of two dead men, not made in this proceeding nor in contemplation thereof; (2) to strike out numerous paragraphs in the moving papers as inferences and conclusions; (3) to strike out numerous paragraphs in the moving papers as irrelevant and redundant.

The first and second motions were made on the 8th instant returnable under orders to show cause on the 13th instant, and the third motion was made on the 13th instant returnable under an order to show cause on the 15th day of July, 1910.

1038 On or about the 11th day of July, 1910, J. Aspinwall Hodge, Esq., the attorney for the relator, called on me at my office, without my invitation, and voluntarily offered to allow us to enter orders granting the first and second motions above referred to, but since that time he has receded from that position and has thrown us all into great perplexity and confusion by his conduct. Upon his insistence the three motions above referred to have been set down for argument for Special Term Part I on the 18th instant, the very day when the notice of motion for mandamus is returnable and the relator has caused to be vacated, without notice to us the

1039

three stays of proceedings contained in said three orders to show cause. We objected in open court to the adjournment of those motions and insisted that they should be disposed of before the hearing of the main motion, but upon the application of the relator and by the direction of the court all of the motions were set over to be heard together.

I annex hereto and make part of the papers in opposition to this motion the affidavits and orders to show cause on said three motions made by The Empire City Subway Company (Limited).

1040

EDMUND L. MOONEY.

Sworn to before me, this
2nd day of August, 1910.

HERBERT L. SEWARD,
Notary Public, Kings Co.
Certificate filed in New York Co.

1041

1042 **Order to Show Cause and Affidavits Why Certain Portions of the Moving Papers Should Not Be Stricken Out Attached to the Affidavit of E. L. Mooney, Read in Opposiion to Motion.**

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

1043 In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

On reading the notice of motion in the above entitled proceeding, dated July 1, 1910, and the papers therein referred to, and the two orders to
1044 show cause made by Honorable Leonard A. Giegerich on the 8th day of July, 1910, and on reading the annexed affidavit of Andrew J. Shipman, verified the 13th day of July, 1910,

And on motion of Blandy, Mooney & Shipman, attorneys for the Empire City Subway Company (Limited), it is

ORDERED, that the New York Electric Lines Company show cause at Special Term Part I of this Court to be held at the New York County Court House, in the Borough of Manhattan, City of New York, on the 15th day of July, 1910, at 10:30

o'clock in the forenoon of that day or as soon 1045
thereafter as counsel can be heard, why an order should not be made striking out from the papers in said proceeding, as irrelevant and redundant, the matters contained in the schedule annexed to the said affidavit of Andrew J. Shipman, namely,

(1) From the affidavit of Wayne W. Wilson, verified the 1st day of July, 1910, the matters and things contained in Exhibit A attached to said affidavit;

(2) From the affidavit of George L. Weed, verified the 27th day of June, 1910, the matters and 1046
things contained in Exhibit B attached to said affidavit;

(3) From the affidavit of Jesse Larrabee, verified the 28th day of June, 1910, the matters and things contained in Exhibit C attached to said affidavit;

(4) From the affidavit of D. A. Reynolds, verified the 30th day of June, 1910, the matters and things contained in Exhibit D attached to said affidavit;

1047

(5) From the affidavit of J. Aspinwall Hodge, verified the 30th day of June, 1910, the matters and things contained in Exhibit E attached to said affidavit; and it is further

ORDERED, that the said New York Electric Lines Company show cause at the said time and place why the applicant should not serve affidavits omitting the matters referred to in the preceding affidavit, and why the Empire City Subway Company (Limited) should not have such other and further relief as may be just; and it is further

1048 ORDERED, that all proceedings on the part of the applicant in said proceeding be stayed until two days after notice of entry of the order made upon this motion.

Service of a copy of this order and of the papers on which the same is granted made this day shall be sufficient.

Dated, New York, July 13, 1910.

JOHN FORD,
Justice of the Supreme Court,
of the State of New York.

1049

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

1050 The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

County of New York, ss.:

Andrew J. Shipman, being duly sworn, says:

I am one of the attorneys for the Empire City Subway Company (Limited) in the above entitled proceeding, and counsel retained in this matter.

I have read the notice of motion in said proceeding, dated the 1st day of July, 1910, and the papers therein referred to. Said papers were served upon the Empire City Subway Company (Limited) on the 1st day of July, 1910. 1051

There is a mass of irrelevant and redundant matter as more specifically set forth in the exhibits annexed hereto, Exhibit A being such irrelevant and redundant matters in the affidavit of Wayne W. Wilson, verified the 1st day of July, 1910; Exhibit B being such irrelevant and redundant matters in the affidavit of George L. Weed, verified the 27th day of June, 1910; Exhibit C being such irrelevant and redundant matters in the affidavit of Jesse Larrabee, verified the 28th day of June, 1910; Exhibit D being such irrelevant and redundant matters in the affidavit of D. A. Reynolds, verified the 30th day of June, 1910; and Exhibit E being such irrelevant and redundant matters in the affidavit of J. Aspinwall Hodge, verified the 30th day of June, 1910. 1052

The Empire City Subway Company (Limited) is aggrieved and embarrassed by such irrelevant and redundant statements in the affidavits, many of which allegations are not within its knowledge nor within its ability to inform itself. It is also aggrieved and embarrassed with respect to such irrelevant and redundant allegations by the technical rules as to the form of the denials necessary to raise an issue of fact upon an application for a peremptory writ of mandamus. I therefore ask that the same shall be stricken from the papers. 1053

On the 8th day of July, 1910, my firm, in behalf of the Empire City Subway Company (Limited), procured two orders to show cause, with stays, one requiring the applicant in this proceeding to show cause why the so-called affidavits of Charles J. Warren and James S. White, both verified the 11th

1054 day of May, 1906, should not be stricken from the papers in this proceeding, and the other requiring the said applicant to show cause why numerous statements in the other affidavits should not be stricken therefrom as conclusions and inferences of the affiants. The orders to show cause were made returnable this morning, and J. Aspinwall Hodge, Esq., attorney for the applicant, notified us that he would consent to the granting of the relief prayed for in both said orders to show cause, and the court has granted orders so striking out said affidavits and statements. The orders in form for entry are before the Court for signature.

1055 The said orders to show cause and orders are part of the moving papers on this application.

We have made this motion promptly as soon as the other motions could be disposed of, and in fact as soon as the orders were presented for entry thereon. The motion for a writ of mandamus in this proceeding is noticed for the 18th day of July, 1910. On the hearing of the motion for said writ the Empire City Subway Company (Limited) will be called upon to file answering affidavits, and as it cannot be determined what action shall be taken with reference to the matters referred to in the annexed exhibits until after the hearing of this

1056 motion, I respectfully ask for a stay pending the determination of the motion to strike out said matters contained in said exhibits.

An order to show cause is asked for because of the necessity for such stay and to procure the determination of the questions involved in this motion before the hearing of the application for said writ.

From the statement of the case in the proceeding made to me by the Empire City Subway Company (Limited) and its officers, agents and representa-

tives, I verily believe that said Empire City Subway Company (Limited) has a good and substantial defense upon the merits to the application for a mandamus and the relief sought in this proceeding, and that the defendant Empire City Subway Company (Limited) intends to oppose the granting of said application upon the merits. 1057

No previous application has been made for the relief hereinabove set forth, nor for an order to show cause herein for that purpose.

ANDREW J. SHIPMAN.

1058

Sworn to before me this
13th day of July, 1910.

HERBERT L. SEWARD,
Notary Public, Kings County.
Certificate filed in New York County.

Exhibit "A".

(1) Although this deponent is advised by the counsel of the Company that no such issue can be raised by the Empire Company upon this application or in any other proceeding, he has been requested to set forth the facts and produce some of the documents which establish the validity and the irrevocability of the Company's charter and franchises, including its rights to maintain, operate and lease low tension conductors in the streets of the City of New York and its right to continue to exercise all of its powers under its charter, even if such franchises and powers were disputed by the city or state. 1059

1060 (II) 9. In October, 1882, the Company was organized and at once actively began business.

(III) The art of placing electric wires underground for electrical purposes was then in its infancy, and was not understood. The electrical insulation for wires, as well as their proper protection from moisture and other elements was in its experimental stage (fols. 12, 13).

(IV) The company at once began the prosecution of its business in several different directions (fol. 13).

1061

(V) (a) It secured inventions, prosecuted applications for patents for them in the name of the inventor in the Patent Office, and secured their issuance and the assignment of patent rights to it (fol. 13).

(VI) Comprehensive (fol. 14).

(VII) In accordance with the city ordinances (fol. 14).

1062 (VIII) It began the business of manufacturing and testing (partly under its patents pending and afterwards granted) of its insulated wires, conduits and other devices and appliances (fol. 14).

(IX) This part of its business included experiments which, at first, were not wholly successful (fol. 15).

(X) But which were brought to such a point as to be entirely practicable in 1885 or 1886 (fol. 15).

(XI) (e) It has aggressively fought its opponents from 1885 down to this date, and by various

proceedings in the Courts endeavored to secure for itself the right to lay conduits in the streets under its franchise (fol. 15). 1063

(XII) (g) It has paid from the time of its incorporation to date, all its city, state and county taxes, including its franchise tax, which has been regularly assessed and collected (fol. 16).

(XIII) Since 1900 more than four hundred thousand dollars has been expended in the Company's business (fol. 17).

(XIV) 10. The patents and the assignment of patent rights to the Company are referred to in Mr. Weed's affidavit, and in Exhibits attached hereto (fol. 18). 1064

(XV) Seventeen patents were prosecuted and finally issued by the United States Government, and in at least one case the patent was put in interference and a proceeding was prosecuted by this company known as the Western Electric Company vs. Shelbourne, before the patent office in 1887 and thereafter. Mr. Shelbourne, the defendant in that proceeding, was the patentee of the patents owned by the Company and was at that time and until his death in the Fall of 1887 the President of the Company (fols. 18-19). 1065

(XVI) 11. The subdivisions (b), (c), and (d) of paragraph 9 hereof, refer to facts the details of which are given in the exhibits already referred to and in the accompanying affidavits of Messrs. Weed, Warren, Larrabee and White (fol. 19).

(XVII) Since the more important issues in this action and the Superior Court action were being

1066 litigated in both the state and federal courts of last resort and would be determined in the Common Pleas action (fol. 26).

(XVIII) During the said period that these questions were being litigated, the Company was engaged in the development of its patents and the manufacture of its cables, insulating material and other apparatus, and was prosecuting the aforesaid interference case in the Patent Office (fol. 26).

(XIX) And the officers of the Company were advised that before proceeding to lay its conduits and
1067 electrical conductors in the streets it must show an existing public demand for the same, and this was the position taken by the city authorities (fol. 28).

(XX) But not for the reasons stated by the said Commissioner and the Corporation Counsel (fol. 31).

(XXI) It was held by Justice Bischoff, as appears in said opinion, that there had been no forfeiture of the corporate life of the company, and that:—

1068 "The franchise from the city obtained by the relator in the year 1883 was irrevocable by the city because not forfeited by any term of the agreement itself."

Citing *People vs. O'Brien,* 111 N. Y., 1.

But he further held (as did also the Court of Appeals) that the application for the writ

"must be denied upon the ground that the franchise was modified by the state in the exercise of the police power and that the relator's

individual right to open the streets for the lay 1069
ing of electrical conductors *in conduits of its own* has passed."

Both at Special Term in the Appellate Division and in the Court of Appeals in said proceeding (which is entitled People ex rel. New York Electric Lines Company vs. Ellison and others) it was held that the passage of the so-called "Subway Acts" of 1885, 1887 and 1891 was a valid exercise of the police power of the State, and did not interfere with the rights of the Company, except to the extent of compelling it to refrain from building its own subways and forcing it to use the subways of 1070
the Empire Company under the provisions of its contract with the city (fols. 33, 33-34).

(XXII) But no attention was paid to this contention in any of the opinions rendered in said proceeding except that in both of them it was held that the franchise and its acceptance by the Company constituted an irrevocable contract between the city and the Company (fol. 37).

(XXIII) This deponent thereupon both before and after the application of June, 1907, presently described, investigated this relationship and found 1071
that the New York Telephone Company is a subsidiary company to the American Telephone and Telegraph Company, that it is the largest stockholder and customer of the Empire Company and the two companies are officered as indicated in the double column below:

	N. Y. TELEPHONE Co.	EMPIRE CO.
President	Theodore N. Vail	Union N. Bethell
Vice President	Union N. Bethel	John H. Cahill
Secretary	John H. Cahill	John H. Cahill
Treasurer	Ford Huntington	Ford Huntington
Gen'l Manager	Howard F. Thurber	Howard F. Thurber
Directors	Theodore N. Vail	Theodore N. Vail
	Union N. Bethel	Union N. Bethel
	John H. Cahill	John H. Cahill
	Howard F. Thurber	Howard F. Thurber
	Ford Huntington	Ford Huntington
	and eight others	John Lieb, Jr.
		(Fols. 39, 40).

(XXIV) The report of the Empire Company filed with the Public Service Commission for the first district for the year ending 1908, has been examined by this deponent, and in it said company reports that

> "the total amount of capital stock outstanding is 43,240 shares whereof the New York Telephone Company owns 38,025 shares and the Edison Light & Power Installation company own 5,185 shares."

Said report further shows that out of a total income account from subway rentals of $1,149,386 it receives from the New York Telephone Company $832,425 and from the New York Edison Company $222,179 and from all other users $94,783.

In the year 1907 the relationship between said Telephone Company and said Subway Company was substantially the same as set forth in said report of 1908 (fols. 41, 42).

(XXV) Notwithstanding the facts above set forth and ascertained by this deponent (fol. 42).

(XXVI) It has maintained an executive office force and a corps of engineers and draftsmen, who have been constantly engaged in devising a comprehensive system of wires to supply telephone users in the City of New York with needed wires (fol. 44). 1075

(XXVII) The present demand of telephone users for these facilities is further set forth in the affidavit of Mr. Reynolds submitted herewith (fol. 45).

(XXVIII) And which show the comprehensive plan for telephone connections in the City of New York upon which a vast amount of labor has been expended (fols. 45, 46). 1076

(XXIX) 25. The taxes—city, state and county—were all duly paid during the first years of the Company's existence, as is shown by the affidavits of Messrs. Weed and Warren submitted herewith, and this deponent knows of his own knowledge that since January, 1900, when he became director, all taxes assessed or levied against the Company have been paid (fol. 46).

(XXX) He holds notices and receipts showing taxation of the franchises of the company, one of them being dated March 5, 1902, from the Department of Taxes and Assessments of the City of New York notifying the Company of an increase of $9,000 in the assessed value of the special franchise of the Company (fols. 46, 47). 1077

(XXXI) At the time when the validity of what is known as the Ford Franchise Act, providing for special franchise tax, was in dispute, this company with many others failed to pay the tax, awaiting a

1078 final decision from the Court of Appeals, and on that occasion the franchise was advertised for sale by the Comptroller of the City of New York. This tax was afterwards paid (fol. 47).

(XXXII) The notices and receipts held by me and on file with the Company show that the Company's special franchise tax has been each year valued by the state authorties and has been duly paid and collected and accepted by the state authorities, and this has been done both before and after the passage of the resolution of the Board of Estimate and Apportionment of May 11, 1906, herein-
1079 before referred to (fol. 48).

(XXXIII) The amount of money that has been expended in the organization of the company in its various activities prior to 1900 this deponent has estimated in subdivision (h) of paragraph 9 of this affidavit, at upwards of $75,000 (fol. 49).

(XXXIV) His information, as to all expenditures prior to 1900 is derived largely from conversations with Messrs. Weed, Warren, Larrabee and White, whose affidavits are submitted herewith,
1089 and other directors and stockholders (fol. 49).

(XXXV) There has been expended in and about the Company's business, including rental of executive and engineering offices, employment of executive and engineering force, securing of contracts from those desiring telephonic communication within and from said city, legal services, payment of taxes and assessments and minor miscellaneous expenses from 1900 to date, a sum in excess of four hundred thousand dollars, which with the amount expended prior to that date, aggregates upwards of four hundred and seventy-five thousand dollars (fols. 49, 50).

(XXXVI) A portion of said sum has been ex- 1081
pended directly by the Company and a portion by its stockholders and those in contractual relation with the Company or its stockholders, for the benefit of the company and the prosecution of its business (fol. 50).

(XXXVII) All of it has been expended in reliance upon the charter and franchise rights of the Company and the decisions of the courts declaring them to be irrevocable (fols. 50, 51).

(XXXVII A) "26 The amount of money that 1082
has been expended in the organization of the company in its various activities prior to 1900 this deponent has estimated in subdivision (h) of paragraph 9 of this affidavit, at upwards of $75,000" (fol. 48).

(This paragraph refers to subdivision (h) of paragraph 9 which has already been stricken from the moving papers under the order referred to in the moving affidavit of this application.)

Exhibit "B." 1083

(XXXVIII) During the first year of the Company's existence and during every year thereafter down to the time of Mr. Shelbourne's death, he was actively engaged in the factory of the Company in Greenwich Street, near Fulton, and also in the offices of the Company at 11 Gold Street, and afterwards in the Queen Building on Wall Street where offices were maintained for three years, and again in Gold Street, down to the time of the fire presently to be referred to. The rental of the offices in the Queen Building began on the 1st of May, 1883, and

1084 terminated on the 1st of May, 1886, and the rental was $1,500 a year. These offices were occupied solely by the New York Electric Lines Company (fols. 3, 4).

(XXXIX) The work conducted by the Company under Mr. Shelbourne's directions at the shop or factory in Greenwich Street, during the first year, consisted in constant experiments with insulating material. One of the materials he was using in his experimental and constructive work there was known as petrapita. This was the name given to it
1085 by Mr. Shelbourne as it was his invention, except is so far as he assigned it with all other inventions to the New York Electric Lines Company for use in the cities of New York and Brooklyn (fol. 4).

(XL) He also during the first year (1882-3) was to my knowledge actively engaged in the preparing of papers for the Patent Office embodying the improvements and inventions he was making for underground electric construction (fol. 5).

(XLI) Mr. Shelbourne was an attorney at law and a patent solicitor, and acted personally for him-
1086 self and the Company in procuring the patents which were afterwards assigned to the Company. After his death, I was appointed his administrator and I discovered that he had not executed an assignment of the patent rights; although all the patents improvements and inventions made by Mr. Shelbourne were the property of the Company for use in the Cities of New York and Brooklyn and the stock of the company was in part issued for those patent rights under an agreement with the said Shelbourne (fols. 5 and 6).

(XLII) I thereupon executed and delivered an assignment to the Company, a copy of which is

hereto annexed. It is recorded in the United States Patent Office in Volume B 39 of Assignments, page 278, on the 8th day of October, 1888 (fol. 6). 1087

(XLIII) As Treasurer of the Company I am able to state of my own knowledge that during the first year of the Company's existence there was spent in the experimental and constructive part of the Company's business a large sum of money, certainly upwards of $30,000, and as far as I am able to calculate at this time without records, I should say it was approximately $50,000. This money was subscribed largely by the incorporators and directors of the Company. Among others, Mr. Warren, I know, paid $100 in cash for the first certificate of stock issued to him May 1st, 1883, and he continued to make contributions to the Company during the first year and in subsequent years, in all aggregating upwards of $12,000. I personally contributed during the first year a sum in excess of $30,000 (fols. 8, 9). 1088

(XLIV) 9. These moneys were contributed by us because of our confidence in Mr. Shelbourne's ability and in his belief (although he was opposed by many experts), that underground electrical insulation was possible and was necessary in large cities. In that belief we continued to contribute to the Company large sums of money during the entire period of our connection with it, and never during my connection with the Company did it ever abandon its intention of constructing conduits under its franchise in the streets of New York City (fols. 9, 10). 1089

(XLV) 11. During all the years from 1883 to 1892, I am entirely familiar with the efforts which were made by the Company to place wires under-

1090 ground and the efforts made in opposition to the Company by interested parties, some of which I am informed, are set forth in other affidavits in the pending proceeding (fols. 11, 12).

(XLVI) 12. In the year 1892 there was pending in the Supreme Court of the United States an appeal from a decision of the Court of Appeals of this State, in which the right of the Company to lay wires underground, and especially the right of the Company to compel Commissioner Squire to grant a permit was involved. I was at that time a member of the Legislature, representing the 11th
1091 District of Kings County. A bill was introduced which afterwards became Chapter 263 of the Laws of 1892. When I saw it I believed that it would seriously affect the rights of the New York Electric Lines Company, and I at once saw my fellow legislators and explained to them the situation, and expressed my dissent from the passage of any such act unless that Company was excepted in some way from its provisions. I explained this to Mr. Timothy Sullivan, who was a member of the Legislature, and both he and I saw a number of the other Assemblymen, and some of the Senators, and explained to them how unjust it would be to pass an
1092 act affecting rights which were then in litigation and had been in litigation in the highest courts of this State and of the nation for some years (fols. 12, 13, 14).

(XLVII) But we discovered that no comprehensive system of telephonic connections could be installed in New York, until the patents of the multiple switchboard expired, which I am informed, did not occur until recently (fol. 16).

(XLVIII) 15. I know of my own knowledge that in every year since the Company's organization in

1882 down to January 1905, all State and city taxes have been paid by the Company, including the franchise tax (fol. 16). 1093

(XLIX) I personally made all the reports to the Department of Taxes down to the year 1905 (fol. 18).

(XLIX A) 16. I am well acquainted with Charles J. Warren, who was elected President of the Company in November, 1887, and am familiar with the contents of an affidavit which was made by him on the 11th day of May, 1906, which is on file among the papers of this Court in a matter entitled "People ex rel. New York Electric Lines Company vs. William B. Ellison," a copy of which affidavits is hereto annexed. The allegations contained in it of which I have personal knowledge are true. Mr. Warren died since the making of said affidavit. 1094

(The affidavit of Charles J. Warren to which the foregoing refers has already been stricken out of the moving papers by the order submitted in support of this application.)

1095

Exhibit "C."

(L) 4. Mr. Shelbourne's attention was called to the confusion existing in this city among the electric light, telephone, telegraph and similar companies in this city about the year 1881, and realized that there would be a great growth in such business, involving the extension of electrical conductors throughout the city. To meet the requirements of the existing and expected situation, said Shelbourne conceived the idea of a corporation to supply the underground electrical conductors for

1096 use by various electric companies in the City of New York, although at that time the underground electric communication was in its infancy and the art of distributing electric current except overhead by telegraphic wires was almost unknown. Many inventions, devices and new appliances in general and common use were not then existent (fol. 4).

(LI) 7. I have read the said affidavit of Mr. Wilson and the statements therein contained are true (fol. 5).

1097 (LII) Many thousands of dollars were expended by the Company in preparation for the instalment of its system of suitable conduits and conductors. The Company was repeatedly advised by its then counsel that it was entitled to lay its conduits and trenches in the streets without the consent of the Commissioners of Subways, afterwards called the Board of Electrical Control, but upon application being made to said Board it refused to grant a permit on the ground that it did not have any jurisdiction over this particular company, and thereupon the proceedings mentioned in Mr. Wilson's
1098 affidavit were begun as therein alleged (fols. 7, 8).

(LIII) The Company has ever stood ready on any public demand therefor, to furnish a comprehensive system of electrical conductors for telephonic purposes, and is now actively engaged in meeting the present public demand (fol. 7).

(LIII A) 11. I was acquainted with James S. White, now deceased, during the entire period that he was connected with the Company. In the year 1906 he made an affidavit in a proceeding in the Supreme Court of this State entitled "People ex

rel. N. Y. Electric Lines Company against William B. Ellison and others, which is on file with that Court. I know the contents thereof and know the allegations therein are true. I annex a copy of that affidavit. 1099

(The affidavit of James S. White to which the foregoing refers has already been striken out of the moving papers by the order submitted in support of this application.)

Exhibit "D." 1100

(LIV) 2. Until 1895 or 1896, the Bell telephone monopoly controlled patents which expired in those years and which until then prevented any independent company from operating telephones. Within two or three years thereafter, independent companies began to be operated in small cities, especially in the West, where the use of the switchboards that would accomodate 1,000 telephones or less could be used; but until within a very few years no independent company was able to use the multiple switchboards with all their necessary appliances, for it was not until that time that the expiration of certain switchboard patents controlled by the Bell monopoly allowed the practical operation of such switchboards by others (fols. 2, 3, 4). 1101

(LV) Thus it was impossible for a comprehensive telephone system to be installed in any city approximating the size of Manhattan without the permission of the Bell telephone monopoly, and that permission could not be obtained (fol. 4).

1102 (LVI) Some of the original multiple switchboard patents expired about 1901, but others which were essential and necessary to the practical operation of such switchboards continued down to about the year 1905 (fol. 4).

Exhibit "E."

(LVII) 2. I have read the affidavit of W. W. Wilson submitted herewith and am able to state that all that he states concerning the legal proceed-
1103 ings in which the Company was involved prior to 1905 is fully confirmed by the examination I have made of the sources of information above mentioned (fol 3).

(LVIII) 5. The Empire Company in March, 1906, filed a brief with the Corporation Counsel in which its counsel sought to sustain the unfounded allegation and contention that the Company had forfeited its franchise by non-user (fol. 5).

(LIX) 6. Such a contention raises no issue
1104 which can be availed of by the Empire Company as has been decided in the Long Acre case, reported in 188 N. Y., 361 (fol. 5).

(LX) Which are denied them by the Bell monopoly (fol. 9).

Order to Show Cause and Affidavits Why Certain Portions of the Moving Papers Should Not Be Stricken out Attached to the Affidavit of E. L. Mooney, Read in Opposition to Motion. 1105

NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited). 1106

On reading the notice of motion in the above-entitled proceedings, dated July 1st, 1910, and the papers therein referred to, and on reading the annexed affidavit of Andrew J. Shipman, verified the 8th day of July, 1910, and on motion of Blandy, Mooney & Shipman, attorneys for the Empire City Subway Company (Limited), it is 1107

ORDERED, that the New York Electric Lines Company show cause at Special Term, Part I of this Court, to be held at the County Court House in the County of New York, Borough of Manhattan, City of New York, on the 13th day of July, 1910, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why an order should not be made,

1108 (1) Striking from the affidavit of Wayne W. Wilson, verified the 1st day of July, 1910, as conclusions and inferences of the affiant.

a. the statement "and has lawful power to operate telegraph and telephone conductors in any street, avenue or highway in the Borough of Manhattan and in certain other portions of the present City of New York, and is an authorized company intending to operate and use electrical conductors in certain of said streets" (fols. 5-6).

1109 b. "The rental charged by the Empire Company, to all its customers varies from $800 to $900 per mile of duct, the total length of duct applied for by the company under the present application is 29,250 feet or five and fifty-four hundredths miles" (fol. 9c).

c. "6. The Empire Company has neglected and refused to accord the space applied for or any part thereof."

"7. It has no valid reason for so neglecting and refusing and has given no reason; but the officers and counsel of said Empire Company have claimed, 1110 upon previous occasions when the company was seeking to enforce its rights, and when others, including the Empire Company, were endeavoring to prevent it from exercising its franchises, that it had forfeited its rights by non-user, and also that its franchises had been revoked by the City" (fols. 10-11).

d. "It carried on this part of its business in establishments which it leased in Greenwich, Gold and Cherry Streets, in this City" (fols. 14-15).

e. "And in reliance upon its charter and franchise rights upwards of one hundred thousand contracts have been entered into with residents of New York City who are desirous of securing telephone facilities and other contracts have been entered into with independent telephone companies outside the City of New York" (fol. 16). 1111

f. "(h) It expended prior to 1892 in its business largely for patents and for manufacturing a sum largely in excess of $75,000; but how much in excess of that amount I am unable to state, since many of the books of the company were destroyed as recited in the 7th paragraph of the affidavit of George L. Weed submitted herewith" (fol. 17). 1112

g. "Which recognized the existence of this company by providing that that act should 'not affect the rights of any corporation inconsistent herewith respecting which rights any litigation is now pending in the Supreme Court of the United States.' The knowledge and intent of the legislature in inserting this provision is fully set forth in the 12th paragraph of Mr. Weed's affidavit submitted herewith" (fols. 27-8).

h. "23. The officers of the company were informed that the Subway Company would endeavor by every means to prevent the New York Electric Lines Company from securing any space in any of the conduits of the Empire Company in the streets of the city, because the said company was alleged to be in and under the control of the American Telephone and Telegraph Company (sometimes called the Bell Telephone Monopoly)" (fols. 38-9). 1113

i. "24. During the entire period from 1892 to date, the company had been actively employed in carrying on its business" (fol. 43).

1114 j. "The space applied for in Exhibit H is an essential part of the said comprehensive plan and is imperatively needed at once" (fol. 44).

k. "Over one hundred thousand contracts have been shown to this deponent signed by the residents of the city who desire to have telephone communications with one another and with the world outside of the city by means of the wires to be provided by the New York Electric Lines Company" (fol. 45).

(2) Striking out from the affidavit of George L. Weed verified June 27, 1910, as conclusions and
1115 inferences of the affiant:

l. "As a result of these conversations there was inserted in the bill and embodied in the act when it became a law, the following sentence:

> "'This act shall not affect the rights of any corporation or individual inconsistent herewith respecting which rights any litigation is now pending in the Supreme Court of the United States.'"

1116 "The bill had been introduced and supported by the Board of Electrical Control, and I saw the various members of the Board in reference to the insertion of that clause, and stated the purpose I had in insisting that the bill should be amended by its insertion, and they finally consented, for the sole purpose of excepting the New York Electric Lines Company, which certainly at that time, as well as at other times, of which I am aware was a corporation which was recognized as existing and doing business, except in so far as it was prevented by the local authorities" (fols. 14-15).

(3) Striking from the affidavit of Charles J. Warren, verified the 11th day of May, 1906, as conclusions and inferences of the affiant: 1117

m. "And I know that the company was actively engaged in the prosecution of its business and never for one day abandoned its business or its duties under its charter" (first page of affidavit).

n. "In 1882 and 1883 the company at once began active operations, in several different directions, in the transaction of its business" (affidavit, 2nd page, near bottom).

1118

o. "But I do know that he always acknowledged that the patents for which he applied during the year 1883 were applied for by him on behalf of the company in so far as they related to the said two cities, and that he was under the obligation to make written assignments thereof at any time upon demand" (affidavit, page 3, near top).

p. "Which was carried on at its factory on Greenwich Street and its offices at 11 Gold Street and in the Queen Building 37 and 39 Wall Street" (affidavit, 4th page, near top).

1119

(4) Striking out from the affidavit of Jesse Larrabee, verified the 28th day of June, 1910, as conclusions and inferences of the affiant:

q. "It has never abandoned its franchises or suspended its business for any period of time whatever" (fol. 8).

(5) Striking out from the affidavit of D. A. Reynolds, verified the 30th day of June, 1910, as conclusions and inferences of the affiant:

1120 r. "The Great Eastern Telephone Company relying upon the said contract with the New York Electric Lines Company, has made contracts with 107,000 subscribers in New York City, fully 60 per cent. of which are in the Boroughs of Manhattan and the Bronx, to supply them with telephones and telephonic connections both local and long distance.

Under these various contracts, obligations have been entered into, some of which are a sfollows:

(1) The New York Electric Lines Company has obligated itself to furnish telephonic communications and facilities of every kind and nature to
1121 all telephone subscribers, which we may provide in the territory covered by its franchise from the City of New York.

(2) The Great Eastern Company has agreed to furnish telephone to the said subscribers at rates approximately one-half of the rates now charged by the New York Telephone Company, the only Telephone Company now operating in said territory.

(3) The Great Eastern Company has entered into contracts with other independent companies and
1122 has agreed to connect its comprehensive system of telephones in New York City with independent lines which are seeking such connection in and with the City of New York.

(4) I am satisfied that if the telephone system of the Great Eastern Company was now in operation, long distance connections could be made within six months' time securing to the system and its subscribers, communication with 250,000 telephones in the State of New York alone, with 2,400,000 telephones in the various other State in which independent companies are now being operated,

especially the States of New Jersey, Pennsylvania, Ohio, Indiana, Illinois, Michigan and Missouri" (fols. 5-8). 1123

s. "I am informed by those entirely familiar with the independent telephone plants throughout the country and I verily believe that such connection would place more subscribers in toll line connection with each other both in the State of New York and in the other States mentioned as far west as Chicago and Kansas City, than are now in toll line connection with the Bell system, now having connection in the State of New York" (fols. 9-10). 1124

t. "5. From various reports made to the United States Census of 1900, and from other sources, including the papers read at conventions and gatherings of independent telephone companies and published in public journals, I am satisfied that since the basic Bell Patents expired, there have been organized and there are now in successful operation over 15,000 incorporated independent telephone companies and over 8,000 co-operative associations representing over $400,000,000 of invested capital and employing over 4,000,000 telephones; while according to the published reports of the Bell Company, formerly the Bell Monopoly, its system now embraces practically 3,300,000 complete instruments, which is 700,000 less than the number of instruments which have been operated as aforesaid, outside of the Bell system, and at least 2,750,000 and upwards of these independent telephones are located near enough to New York City to be within good, practical talking distance. Not one of these can now obtain connection with the City of New York because of a well-known contract between the parent Bell Company and each and every one of its operating companies prohibiting connec- 1125

1126 tion with any instrument not manufactured or controlled by the present Bell Company and its allied companies" (fols. 10-12).

u. "Under the proposed contracts with and between independent telephone companies, subscribers to the New York City system of the Great Eastern Telephone Company will have the right of making toll line connection at rates 40 to 60% less than the long distance rates now charged by the Bell Company, which are lower since competition has intervened, than those exacted heretofore" (fol. 13).

1127

v. "7. The Great Eastern Telephone Company has abundant financial backing, and has entered into the telephone field in the City of New York in good faith and with the bona fide intention of being and continuing a competing and independent telephone system in every sense of the word, and in its contracts with other independent companies there is a specific clause which forbids this Company to sell out to, or consolidate with any of the companies owned or controlled by the Bell System."

1128

(6) Striking out from the affidavit of J. Aspinwall Hodge, verified the 30th day of June, 1910, as conclusions and inferences of the affiant.

w. "It is not only unfounded in fact, but it is an issue which has twice been raised by applications instigated by the subway and Bell telephone interests, made to attorney generals of the state and on both occasions, one in 1886, and one in 1906, it was held that there had been no forfeiture of the company's charter or franchise, and the applications were denied after full hearing and argument" (fols. 5-6).

x. "On said application the Company was represented by its President, Sidney F. Shelbourne, who filed an affidavit with the Attorney-General, which was duly sworn to on the 9th day of October, 1888, wherein he states the same facts concerning the active operations of the company prior to 1887 as are stated in the affidavits of Messrs. Wilson, Weed, Warren, Larrabee and White submitted herewith" (fol. 7). 1129

And why the Empire City Subway Company (Limited) should not have such other and further relief as may be just; and it is further

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ORDERED, that all proceedings on the part of the applicant in the above entitled proceeding be stayed until two days after the notice of entry of the order made upon this motion.

Service of a copy of this order and of the papers on which same is granted made this day shall be sufficient.

L. A. GIEGERICH,
Justice of the Supreme Court,
of the State of New York.

1131

1132 NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY
1133 SUBWAY COMPANY (Limited).

County of New York, ss.:

Andrew J. Shipman, being duly sworn, says:

I am one of the attorneys for the Empire City Subway Company (Limited), in the above entitled proceeding.

I have read the notice of motion in said proceeding dated the 1st day of July, 1910, and the papers therein referred to. In the affidavits therein contained are numerous conclusions and inferences of
1134 the affiants unsupported by the facts sworn to by said affiants. I respectfully submit that the Empire City Subway Company (Limited), should not be required to answer such conclusions and inferences especially in view of the nature of this proceeding. The particular conclusion and inferences objected to are more especially set forth in the annexed proposed order to show cause.

I further respectfully submit that said conclusions and inferences should be stricken out from said affidavits before the Empire City Subway Company (Limited) should be required to file its

affidavits in answer to said application in this proceeding, and I therefore ask that the same shall be stricken from the papers in this proceeding. 1135

The motion for a writ of mandamus in this proceeding is noticed for the 18th day of July, 1910. Upon the hearing of the motion for said writ the Empire City Subway Company (Limited) will be called upon to file answering affidavits, and as it cannot be determined what action should be taken with reference to said conclusions and inferences until after the hearing of this motion, I respectfully ask for a stay pending the determination of the motion to strike out said conclusions and inferences. 1136 An order to show cause is asked for because of the necessity for such stay and to procure the determination of the questions involved in this motion before the hearing of the application for said writ.

No previous application has been made for such relief.

ANDREW SHIPMAN.

Sworn to before me this
8th day of July, 1910.

1137

HENRY HUDSON,
Notary Public,
New York County.

1138 **Order to Show Cause and Affidavits Why Certain Portions of the Moving Papers Should Not Be Stricken out Attached to the Affidavit of E. L. Mooney, Read in Opposition to Motion.**

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

1139 In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

On reading the notice of motion in the above entitled proceeding, dated July 1st, 1910, and the papers therein referred to, and on reading the an-
1140 nexed affidavit of Andrew J. Shipman, verified the 8th day of July, 1910, and on motion of Blandy, Mooney & Shipman, attorneys for Empire City Subway Company (Limited), it is

ORDERED, that the New York Electric Lines Company show cause at Special Term, Part I of this Court, to be held at the County Court House in the County of New York, Borough of Manhattan, City of New York, on the 13th day of July, 1910, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made striking from

the papers in said proceedings the so-called affi 1141
davits of Charles J. Warren and James S. White, both verified the 11th day of May, 1906, upon the ground, among others, that the same were not made in this proceeding nor in contemplation thereof and are not properly receivable or useable on said motion; and why the Empire City Subway Company should not have such other and further relief as may be just; and it is further

ORDERED, that all proceedings on the part of the applicant in the above entitled proceeding be stayed until two days after the notice of entry of 1142
the order made upon this motion.

Service of a copy of this order and of the papers on which same is granted made this day shall be sufficient.

Dated, New York City, July 8, 1910.

(Signed) L. A. GIEGERICH,
Justice of the Supreme Court
of the State of New York.

1143

1150 **Affidavit of John M. Ferry, Read in Opposition to Motion.**

NEW YORK SUPREME COURT,

NEW YORK COUNTY.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited).

1151

State of New York, }
County of New York, } ss. :

John M. Ferry, being duly sworn, says: I reside in the Borough of Manhattan, New York City, and am an attorney and counselor at law of the State of New York.

1152 On August 1st, 1910, at the office of the State Board of Tax Commissioners in the Capitol in Albany, N. Y., I personally examined all the special franchise reports made by the New York Electric Lines Company to said State Board of Tax Commissioners being for the years 1899, 1900, 1902, 1903, 1904, 1905, 1906, 1907, 1908 and 1909, which reports were duly verified by the officers of said company.

In said reports it is stated that the capital stock of said New York Electric Lines Company is Five million dollars ($5,000,000), consisting of fifty thousand (50,000) shares of the par value of One

1153

hundred dollars ($100) each, and that said capital stock was issued for and in consideration of United States patents which had or were about to expire.

In reply to the inquiry of the State Board of Tax Commissioners as to the market value of said shares of capital stock of said New York Electric Lines Company it is stated in said reports that the highest price for which said shares had sold during the years for which said reports were made was two cents (2c.) a share, and that such market value varied from one-half cent (½c.) to two cents (2c.) a share. In the report for the year 1908 the following statement appears:

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> "Some of the stock was lost in fire, some cannot be traced and some is now deposited in Manhattan Trust Company pending litigation"

and in the report for the year 1909 it is stated as follows:

> "Some of the stock was destroyed by fire, some cannot be traced, balance is in hands of Carnegie Trust Company under terms of a mutual trust agreement."

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In each and all of said reports it is stated that said New York Electric Lines Company had no property or assets whatever.

In said reports it is further stated that a syndicate had advanced certain moneys to defray expenses of preparing maps, etc., and prosecuting litigation to test validity of the franchise rights of said New York Electric Lines Company, and that upon the outcome of such litigation would depend whether or not the assets of said Company would equal the expenditures of said syndicate.

1141 NEW YORK SUPREME COURT,

COUNTY OF NEW YORK.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY
1145 SUBWAY COMPANY (Limited).

County of New York, ss. :

Andrew J. Shipman, being duly sworn, says: I am one of the attorneys for the Empire City Subway Company (Limited) in the above entitled proceeding.

I have read the notice of motion in said proceeding dated the 1st day of July, 1910, and the papers therein referred to. Among the papers therein contained are two affidavits of Charles J. Warren and
1146 James S. White, both verified the 11th day of May, 1906. In the moving papers these have been set forth without any caption whatsoever, though it appears in the other moving papers that said affidavits were made in an entirely different and distinct proceeding from the above entitled proceeding, namely, "People ex rel. N. Y. Electric Lines Company against William B. Ellison and others."

It therefore clearly appears that said affidavits were not made in this proceeding nor in contemplation thereof. I respectfully submit that the same are not properly receivable or useable on the application in this proceeding, and I therefore ask that

, the same shall be stricken from the papers in this proceeding. 1117

The motion for a writ of mandamus in this proceeding is noticed for the 18th day of July, 1910. Upon the hearing of the motion for said writ the Empire City Subway Company (Limited) will be called upon to file answering affidavits, and as it cannot be determined what action should be taken with reference to the so-called affidavits of Warren and White until after the hearing of this motion, I respectfully ask for a stay pending the determination of the motion to strike out the said so-called affidavits. An order to show cause is asked for because of the necessity for such stay and to procure 1118
the determination of the questions involved in this motion before the hearing of the application for said writ.

No previous application has been made for said relief nor for an order to show cause herein for that purpose.

(Signed) ANDREW J. SHIPMAN.

Sworn to before me this
8th day of July, 1910.

1119

HENRY HUDSON,
Notary Public,
New York County.

In each and all of said reports it is stated that the said Company has never exercised any rights to do business in or under the streets of the City of New York, and none of said reports shows any receipts from, or disbursements for, operation, and said reports state that the Company did not operate.

While at the office of said State Board of Tax Commissioners as aforesaid I was informed by employes at work in the said office that the New York Electric Lines Company had requested the said
1157 State Board of Tax Commissioners to continue to make an annual assessment of ten thousand dollars ($10,000) against said New York Electric Lines Company on the value of its alleged rights under the resolution or ordinance of the Board of Aldermen of The City of New York of April 10, 1883, for the reason that the Company's rights under such resolution or ordinance were in litigation and that an assessment thereof by the State Board of Tax Commissioners would be an advantage to said New York Electric Lines Company; and that I was further informed by said employes that no assessment
1158 had been made by said Board against said New York Electric Lines Company for the years 1909 and 1910 for the reason that the said Board had been advised by representatives of the Bureau of Franchises of the Board of Estimate and Apportionment of The City of New York that the said resolution or ordinance of April 10, 1883, had been revoked and cancelled by said The City of New York.

J. M. FERRY.

Sworn to before me this
2nd day of August, 1910.

LINCOLN JONES,
Notary Public, Kings Co.
Cert. filed in N. Y. Co.

Opinion of Mr. Justice Bischoff. 1159

NEW YORK SUPREME COURT,

SPECIAL TERM—PART I.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY (Limited). 1160

Motion for peremptory writ of mandamus.

Motions to strike out certain allegations from moving papers.

ALTON B. PARKER, HENRY A. GILDERSLEEVE, ALEXANDER S. BACON, JERRY A. WERNBERG, and J. ASPINWALL HODGE, JR., Esquires, for applicant, New York Electric Co.

EDMUND L. MOONEY, JOHN H. CAHILL, FREDERICK A. CARD and CHARLES T. RUSSELL, Esquires, for respondent, Empire City Subway Co. 1161

BISCHOFF, J. :

Asserting its "lawful power" to operate telegraph and telephone conductors in any street in the Borough of Manhattan, City of New York, the applicant seeks a peremptory writ of mandamus to compel the respondent, the Empire City Subway Company, to accord and provide space in its sub-

1162 ways for electrical conductors desired by the applicant to be installed for its use. Upon an earlier application for a writ of mandamus, to enforce an alleged right in the applicant to open the surface of the streets to build subways of its own (People, ex rel. N. Y. El. Lines Co. vs. Ellison, 51 Misc., 413; 115 App. Div., 254; 188 N. Y., 523), the facts with respect to the corporation's continued right to the enjoyment of its franchise were presented to the Court, and the matters set forth in the published opinions in that proceeding are again alleged. The relief asked at that time was refused upon the
1163 ground that, assuming the continued effectiveness of the applicant's corporate charter, and that the franchise or permission granted by the municipal authorities in the year 1883 was irrevocable, the State had, none the less, taken away by competent legislation the applicant's right to build its own subways. For the purposes of the present motion, the applicant must establish its "lawful power" to operate its wires within the city, such being the term used in the contract made between the municipality and the respondent, with legislative approval (Laws 1891, Chap. 231), and the right to relief by mandamus, where the respondent refuses
1164 subway space, is afforded to a corporation "lawfully competent to * * * use or supply electricity or to operate electrical conductors in any street, avenue or highway, in the City of New York" (Laws 1887, Chap. 716, Sec. 7). There is thus presented the question whether the applicant has disclosed a legal right to operate wires for telegraph and telephone service within the City, beyond any actual dispute of fact affecting the existence of that right, since a peremptory, not an alternative, writ is sought.

So far as there is dispute as to the applicant's continued corporate existence, because of an al-

leged non-user of its franchise, I have no doubt 1165
that, as between these parties, the question does not actually arise. Whether or not the State has ground for declaring the charter forfeited, no forfeiture has been declared, and the applicant's right to exist or to use such franchise as remain to it, because not actually taken away, cannot well be assailed. But the franchise to operate wires within the City was not complete without a consent upon the part of the municipal authorities. This consent was an essential condition of all the legislation upon the subject, including the act under which the applicant was incorporated (People ex rel. West Side El. Co. vs. Con. Sub. Co., 110 App. 1166
Div., 171; 187 N. Y., 58), the existence of which condition is open to litigation between the present parties (s. c.). The permit from the Department of Water Supply, Gas and Electricity, which the statute requires and which may be granted after space is provided in the subways (Matter of Long Acre, &c., Co., 188 N. Y., 361, 369) is not the consent of the municipal authorities (People ex rel. West Side El. Co. vs. Con. Sub. Co., *supra*)," and this applicant's right—its "lawful power, upon which the present motion depends—must rest upon the continued effectiveness of the consent of the 1167
Board of Aldermen given in 1883.

Upon the previous motion for mandamus, which was denied upon the ground that whatever the contract rights of the applicant, it was within the power of the legislature to forbid the construction by it of its own subways, I assumed for argument, when discussing the question in the opinion filed, that this consent by the Board of Aldermen was irrevocable upon the part of the municipality. The point, however, was not decided (51 Misc., 418). The Court of Appeals likewise stated its argumentative assumption of this point favorably to the

1168 applicant, when affirming the affirmance by the Appellate Division of my order (188 N. Y., 527). In the course of the opinion rendered by the Appellate Division, however, this question was directly considered, and an opinion expressed upon the merits, in the language of Mr. Justice Ingraham (115 App. Div., 263), as follows:

"To constitute a contract between the City "of New York and the relator I think some-"thing more must exist than the mere granting "to the relator permission to use its streets. "No franchise was granted by the City of New
1169 "York. The franchise, if any, was granted by "the State. Undoubtedly, when the consent "of the City was given, if that consent had "been acted upon and the subways constructed, "a property right would have been acquired "which the City could not take without com-"pensation; but where, under these statutes, a "mere right is given, subject to the consent of "the City, the consent of the City itself grants "no franchise or creates no contract until it "is acted on by the grantee. This consent is "spoken of by the learned counsel for the re-
1170 "lator as a grant from the City. The statute "(Laws of 1881, Chap. 483, amdg. Laws of "1879, Chap. 397, Sec. 1) provides that 'any "company or companies organized and incor-"porated under the laws of this State * * * "are hereby authorized, from time to time, to "construct and lay lines of electrical con[illegible]-"tors under ground in any city,' etc., 'provided "that such company shall, before laying any "such line in any city, village or town of this "State, first obtain from the Common Council "* * * permission to use the streets with-"in such city, village or town for the [illegible]

"herein set forth.' On April 10, 1883, the 1171
"Board of Aldermen of the City of New York,
"passed an ordinance which provided 'that
"permission be and hereby is granted to the
"New York Electric Lines Company to lay
"wires or other conductors of electricity in
"and through the streets, avenues and high-
"ways of New York City, to make connections
"of such wires or conductors underground by
"means of the necessary vaults, test-boxes and
"distributing conduits.' The relator gets its
"right to use the streets from the State. But
"that right does not accrue until the muni- 1172
"cipal corporation gives permission. When
"that permission is once given then the right
"is complete. But it cannot be that a muni-
"cipal corporation, having given its permission,
"is bound hand and foot so that the permis-
"sion can never be revoked, although the cor-
"poration neglects to act under it and con-
"struct its lines for such a period as would
"divest a person of real property by adverse
"possession. All of the elements of a contract
"are wanting. The relator assumed no obliga-
"tion whatever on relation to the construction
"of the subway. All it ever agreed to do was 1173
"that when it built the subway it would com-
"ply with the conditions imposed. Until the
"permission granted was accepted by some act
"of the corporation under it I think there was
"no contract. If the relator had agreed to con-
"struct those subways within a specified time
"a different question would have been present-
"ed, but in all the cases where these grants of
"franchises have been held irrevocable it was
"because there was an obligation to construct
"the thing granted or the grantee had acted
"under the grant and had constructed it. In

1174 "these cases a consideration would be appar-
"ent. The relator had not acted under the per-
"mission granted by the Common Council."

From the papers now before me it appears that the City has revoked the consent given in the year 1883, and, according to the law as expressed by the Court of next resort, with respect to the character of this very consent, the revocation was within the power of the City to accomplish under conditions which are presented by the facts alleged. This is not a collateral fact for adjudication. The question
1175 is not what the City might have done, or might still do, upon application to the courts. The act of revocation is a fact. If performed with power, that act put an end to the operative character of the applicant's franchise, and the question of validity is one of law, a question upon which judicial opinion, binding upon this Court, has been expressed by the court of review. The applicant's right to a writ of mandamus depends, as I have noted, upon its "lawful power," or upon its being "lawfully competent" to operate its wires under the City's streets. To be thus qualified, it must assert a consent from the City, and must tender an
1176 issue as to whether that consent exists. If once given, but revocable in law and revoked in fact, the consent does not exist, and an issue is thus raised upon a point vital to the legal right sought to be enforced. The motion for a peremptory writ of mandamus must, therefore, be denied.

There are before me three motions by the respondent to strike out allegations from the moving papers on the ground that the matters alleged are irrelvant, or are so set forth as to present the affiants' conclusion of facts or to relate to facts not within the knowledge of the affiants. The matters sought to be stricken out as irrelvant have

to do with the history of the applicant's organization and activities and bear upon the question of good faith, which is involved in every application for a writ of mandamus. The facts cannot be deemed irrelevant in view of the long period which has intervened the applicant's organization and the present motion, with the inference of laches in the absence of any explanation. So far as the form of the averments is called in question, it is to be noted that moving papers for a writ of mandamus, are, in the nature, not only of a vehicle of proof (Code Civ. Pro., Sec. 2070) but of a pleading containing issuable allegations of ultimate facts (Moses on Mandamus, 205). Conclusions of fact and statements not necessarily within the affiant's knowledge may thus be stated as defining an issue tendered. Some further proof may be looked for to support these ultimate statements if the relator or applicant is to take a writ *pro confesso* (People ex rel. Bourke vs. Grout, 107 App. Div., 228, 229), but whether that proof be elsewhere presented or not, the allegations cannot be stricken out. Examining all the averments to which these motions are directed, I fail to find any substantial ground for holding that the respondent may be prejudiced by their retention as part of the moving papers, and the motions to strike out are, therefore, denied with costs.

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1180 **Stipulation Waiving Certification.**

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal, the order appealed from and all the papers upon which the Court below acted in making said order, and the whole thereof, now on file in the office of the Clerk of New York County, together with a copy of the opinion of Mr. Justice Bischoff.

Certification thereof, in pursuance to Section
1181 1353 of the Code of Civil Procedure, is hereby waived.

Dated, November , 1910.

J. ASPINWALL HODGE,
Attorney for Applicant-Appellant.

BLANDY, MOONEY & SHIPMAN,
Attorneys for Respondent.

1182

Order of the Appellate Division Appealed From. 1183

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 25th day of November, 1910.

Present—Hon. George L. Ingraham, P. J.,
" Chester B. McLaughlin,
" Frank C. Laughlin,
" Francis M. Scott, 1184
" Victor J. Dowling, J. J.

In the Matter

of

The Application of The New York Electric Lines Company for a writ of mandamus directed to the Empire Subway Company, Ltd. 1185

The New York Electric Lines Company
Appellant,

The Empire City Subway Company, Ltd.,
Respondent.

An appeal having been taken to this Court by the above named applicant from an order of the Supreme Court entered on the 2nd day of Novem-

1186 ber, 1910, and said appeal having been argued by Mr. J. Aspinwall Hodge, of counsel for the appellant, and Mr. Edmund L. Mooney, of counsel for the respondent; and due deliberation having been had thereon, it is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $10 costs and disbursements.

Enter.

G. L. I.

Notice of Appeal to the Court of Appeals.

1188

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY
1187 SUBWAY COMPANY, LIMITED.

The NEW YORK ELECTRIC LINES COMPANY,
Appellant,

The EMPIRE CITY SUBWAY COMPANY, LIMITED,
Respondent.

Sirs:

PLEASE TAKE NOTICE that the New York Electric Lines Company, the applicant herein, here-

by appeals to the Court of Appeals from the order of the Appellate Division of the Supreme Court of the State of New York, in the First Department, entered and filed in the office of the Clerk of the said Court on the 25th day of November, 1910, affirming an order of the Supreme Court of the State of New York, entered in the office of the Clerk of New York County on the 1st day of November, 1910, denying the application of the applicant for a peremptory writ of mandamus, and from each and every part of said order. 1189

Dated, New York, November 26, 1910. 1190

Yours, etc.,

J. ASPINWALL HODGE,
Attorney for New York Electric Lines Co.,
5 Nassau Street,
New York City.

To
BLANDY, MOONEY & SHIPMAN, Esqs.,
Attorneys for Respondent,
41 Wall Street,
New York City. 1191

1192 **Opinion of the Appellate Division.**

In the Matter

of

The NEW YORK ELECTRIC LINES Co.,

Appellant,

vs.

EMPIRE CITY SUBWAY COMPAY, LTD.,

1193 Respondent.

Order affirmed with $10 costs and disbursements on the authority of New York Electric Lines Co. vs. Ellison (115 App. Div., 254; affirmed 188 N. Y., 523).

Affidavit as to Opinion.

State of New York, }
County of New York, } ss.:

J. Aspinwall Hodge, being duly sworn says:

1194 That he is the attorney for the appellant, the New York Electric Lines Company, in the above entitled action.

That no opinion, other than the memorandum set forth above, was rendered by the Justices of the Appellate Division in affirming the order of the Supreme Court.

J. ASPINWALL HODGE.

Sworn to before me this 13th day of November, 1911.

CHARLES F. NOVOTNY,
Notary Public,
New York County.

Waiver of Certification. 1195

SUPREME COURT,

APPELLATE DIVISION—FIRST DEPARTMENT.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY, LIMITED. 1196

THE NEW YORK ELECTRIC LINES COMPANY,

Appellant,

THE EMPIRE CITY SUBWAY COMPANY, LIMITED.

Respondent.

1197

Certification of the within papers on appeal as required by Section 1315 of the Code of Civil Procedure and Rule 1 of the Court of Appeals, is hereby waived.

~~And it is hereby consented that the appeal may be heard upon the uncertified printed papers of which the within is a copy.~~

And it is hereby stipulated that the within papers are true copies of the Notice of Appeal to the Court of Appeals, the order of the Appellate Division appealed from, and the papers on which the court below acted in making the said order denying a

peremptory writ of mandamus, and the whole thereof, on file in the office of the Clerk of New York County.

And it is further stipulated that the foregoing contains a true copy of the opinion of the Appellate Division.

JAN 12 1911

Dated, [redacted].

J. ASPINWALL HODGE,
Attorney for Appellant.

BLANDY, MOONEY & SHIPMAN,
Attorneys for Respondent.

At a Special Term of the Supreme Court of the State of New York, Part II thereof, Held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, This 30 Day of March, 1911.

Present: Hon. Joseph E. Newburger, Justice.

In the Matter of the Application of the NEW YORK ELECTRIC LINES for a Writ of Mandamus Directed to the Empire City Subway Company (Limited).

The above named the New York Electric Lines Company having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court of the State of New York, in the First Department, entered and filed in the Office of the Clerk of the said Court on the 25th day of November, 1910, which affirmed an order of the Supreme Court of the State of New York, entered in the Office of the Clerk of New York County, on the 1st day of November, 1910, denying its application for a peremptory writ of mandamus to be directed to the respondent, the Empire City Subway Company, (Limited), and from each and every part of the said order, and the said appeal having been duly argued at the Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said order so appealed from as aforesaid be affirmed with costs, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court there to be proceeded upon according to law;

Now on reading and filing the remittitur from the Court of Appeals herein, and upon motion of Messrs. Blandy, Mooney & Shipman, attorneys for the respondent, it is

Ordered, that the said order and judgment be, and the same hereby are, made the order and judgment of this Court.

Enter,

J. E. N., *J. S. C.*

[Endorsed:] New York Supreme Court, New York County. In the Matter of the application of the New York Electric Lines Company for a writ of mandamus directed to the Empire City Subway Company, (Limited). (Copy.) Order and notice of entry. Blandy, Mooney & Shipman, Attorneys for respondent, No. 37 Wall Street, Manhattan, New York City. Due and timely service of a copy of the within —— is hereby admitted —— —, 191–. —— ——, Attorney for —— ——. To J. Aspinwall Hodge, Esq., Attorney for Applicant. Received Mar. 30, 1911. J. Aspinwall Hodge, New York.

EXHIBIT A.

COURT OF APPEALS,
State of New York, ss:

Pleas in the Court of Appeals, Held at the Capitol, in the City of Albany, on the 28th Day of March, in the Year of Our Lord One Thousand Nine Hundred and Eleven, before the Judges of said Court.

Witness, the Hon. Edgar M. Cullen, Chief Judge, presiding.
R. M. BARBER, *Clerk.*

Remittitur, March 29th, 1911.

In the Matter of the Application of the NEW YORK ELECTRIC LINES Company for a Writ of Mandamus Directed to the Empire City Subway Company (Limited).

Be it remembered, that on the 12th day of January in the year of our Lord one thousand nine hundred and eleven New York Electric Lines Company the appellant in this proceeding, came here into the Court of Appeals, by J. Aspinwall Hodge, its attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Empire City Subway Company, (Limited), the respondent, in said proceeding afterwards appeared in said Court of Appeals by Blandy, Mooney & Shipman, its attorneys. Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Alton B. Parker of counsel for the appellant, and by Mr. Edmund L. Mooney of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs as foresaid. And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

Court of Appeals.

CLERK'S OFFICE, ALBANY, *March 29th*, 1911.

I hereby certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein attached thereto.

[Seal of Court of Appeals.]

R. M. BARBER, *Clerk*.

[Endorsed:] 2905/1910. Supreme Court of the State of New York, County of New York. In the Matter of the Application of the New York Electric Lines Company for a Writ of Mandamus directed to the Empire City Subway Company (Limited). (Copy.) Remittitur and notice of filing. Blandy, Mooney & Shipman, Attorneys for Respondent, No. 37 Wall Street, Manhattan, New York City. To J. Aspinwall Hodge, Esq., Attorney for Applicant, 5 Nassau Street, New York City. Received Mar. 30, 1911. J. Aspinwall Hodge, New York.

Know all men by these presents, that we, New York Electric Lines Company, as principal, and the Fidelity and Deposit Company of Maryland, having an office and principal place of business for the State of New York at No. 2 Rector Street, in the Borough of Manhattan, in the City of New York, as surety, are held and firmly bound unto The Empire City Subway Company, in the full and just sum of Five Hundred Dollars ($500), to be paid to the said The Empire City Subway Company, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this Fifteenth day of October, Nineteen hundred and twelve.

Whereas, lately at a term of the Court of Appeals of the State of New York in a proceeding depending in said Court between the New York Electric Lines Company and The Empire City Subway Company, a judgment and order was rendered against the said New York Electric Lines Company, and the said New York Electric Lines Company, having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the order in the aforesaid suit, and a citation directed to the said The Empire City Subway Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said New York Electric Lines Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea

good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] NEW YORK ELECTRIC LINES COMPANY,
By D. A. REYNOLDS, *Treasurer.*
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By HUGH M. ALLWOOD, *Attorney-in-Fact.*

Attest:
[SEAL.] JAMES R. KINGSLEY, *Attorney-in-Fact.*

STATE OF NEW YORK,
County of New York, ss:

On this 15th day of October, 1912, before me personally came D. A. Reynolds, to me known, who, being by me duly sworn did depose and say that he resided in the City of New York, Borough of Manhattan; that he is the treasurer of the New York Electric Lines Company, the Corporation described in and which executed the above instrument, that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal, that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order.

[SEAL.] ALEXANDER HOLTZOFF,
Notary Public, # 231, New York County.

STATE OF NEW YORK,
County of New York, ss:

On the 15th day of October, in the year 1912, before me personally came Hugh M. Allwood, to me known, who, being by me duly sworn, did depose and say, that he resides in the City of New York; that he is the Attorney in Fact of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the Fidelity and Deposit Company of Maryland has been duly authorized to transact business in the State of New York, in pursuance of the statutes in such case made and provided; and that the liabilities of said Company do not exceed its assets as ascertained in the manner provided in Section 183, of the Insurance Law, constituting Chapter 28, of the Consolidated Laws of the State of New York. And the said Hugh M. Allwood, further said that he is acquainted with James R. Kingsley, and knows him to be the Attorney in Fact of said Company; that the signature of the said James R. Kingsley, subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley, and was subscribed thereto by like order of the Board of Directors, and in the presence of him, the said Hugh M. Allwood.

[SEAL.] ERNEST L. HICKS,
Notary Public, New York County, No. 94.

At a regular meeting of the Board of Directors of the Fidelity and Deposit Company of Maryland, held in its office in the City of Baltimore, State of Maryland, on the 4th day of October, 1911, the following resolution was unanimously adopted:

"Resolved, That Henry B. Platt, Vice-President, James R. Kingsley, Attorney, Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood, Charles V. R. Marsh, Ernest L. Hicks and Frank A. Eickhoff, all of the City of New York, State of New York, be and each of them is, hereby appointed Attorney-in-Fact of this Company and empowered to execute and deliver and attach the seal of the Company to any and all bonds or undertakings for or on behalf of this Company, in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds or undertakings required or permitted in all actions or proceedings, or by law required, permitted or allowed.

"Such bonds or undertakings to be executed for the Company by any one of the said Henry B. Platt, James R. Kingsley, Frank H. Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood, Charles V. R. Marsh, Ernest L. Hicks or Frank A. Eickhoff, and to be attested in every instance by one other of the said Attorneys-in-Fact, as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, James R. Kingsley, Attorney in Fact of the Fidelity and Deposit Company of Maryland, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original Resolution. Given under my hand and the seal of the Company, at the City of New York, this 15th day of October, 1912.

[SEAL.] JAMES R. KINGSLEY,
Attorney-in-Fact.

Fidelity and Deposit Company of Maryland.

Statement of June 30, 1912.

Resources.

Real Estate. (Fidelity Building and 210-212-214 North Charles Street.)	$2,312,558 99
U. S. Government Bonds	175,750 00
British Consols	206,648 00
State and Municipal Bonds	1,101,965 94
Street Railway Bonds	309,100 00
Railroad Car Trust and other Bonds	773,000 00
Bank and other Stocks	1,502,057 00

Loaned to National Banks (Secured by Collateral), U. S. Government Bonds	104,600 00
Premiums in course of collection (Ag'ts)	1,137,487 88
Premiums in course of collection (Home Office)	21,816 93
Cash in Office and in Banks	473,272 27
Advance on Contracts (Secured)	383,689 94
Total	$8,501,946 95

Liabilities.

Capital Stock	$2,000,000 00
Premium Reserve Requirement	2,214,090 23
Reserve for Claims Adjusted (checks out)	18,210 18
Reserve for Contingent Claims	963,010 17
Reserve for Taxes on Premiums (Payable in 1912)	75,000 00
Reserve for Taxes on Real Estate	40,000 00
Reserve for Expenses in Transit	10,000 00
Reserve for liquidation account of Philadelphia Casualty Co.	11,185 68
Commissions due Agents on Premiums in course of collection	294,679 63
Premiums due on Reinsurance	21,223 63
Surplus	2,854,517 43
Total	$8,501,946 95

STATE OF NEW YORK,
County of New York, ss:

James R. Kingsley, being duly sworn, says that he is the Attorney in Fact of the Fidelity and Deposit Company of Maryland, that the foregoing is a true and correct statement of the financial condition of said Company, as of June 30, 1912, to the best of his knowledge and belief, and that the financial condition of said Company is as favorabble now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 15" day of Oct., 1912.

[SEAL.] ERNEST L. HICKS,
Notary Public, New York County, No. 94.

[Endorsed:] Copy. New York Electric Lines Co. and Fidelity and Deposit Company of Maryland to The Empire City Subway Company. Copy. Bond. I hereby certify that the surety on the within bond is sufficient. N. Y., Oct. 15, 1912. Alex. Gilchrist, Jr., Clerk U. S. District Court, S. D. of N. Y. (Seal.) I approve of the within Bond and of the sufficiency of the surety therein. Dated Oct. 16, 1912. Charles E. Hughes, Associate Justice of the Supreme Court of the U. S. Fidelity and Deposit Company of Maryland, 2 Rector Street, New York.

Supreme Court of the United States.

In the Matter of the Application of THE NEW YORK ELECTRIC LINES Company, Plaintiff in Error, for a Writ of Mandamus Directed to the Empire City Subway Company (Limited), Defendant in Error.

Petition in Error.

The petition of The New York Electric Lines Company, by J. Aspinwall Hodge, its Attorneys, respectfully shows:

That on or about the 28th day of March, 1911, the Court of Appeals of the State of New York, made and entered a final order and judgment herein in favor of the Empire City Subway Company (Limited) and against the plaintiff in error The New York Electric Lines Company, in which final order and judgment and in the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the plaintiff in error, all of which will more in detail appear from the assignment of errors which is filed with this petition.

The said Court of Appeals of the State of New York, is the highest Court of the said State of New York, in which a decision in this suit and in this matter could be had.

Wherefore The New York Electric Lines Company, plaintiff in error, petitions and prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court in and for the County and State of New York, possessed of the record in this cause by a remittitur from the said Court of Appeals of the State of New York, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 9th day of September, 1912.

J. ASPINWALL HODGE,
Attorney for Plaintiff in Error.

[Endorsed:] Supreme Court of the United States. In the Matter of the Application of The New York Electric Lines Company, Plaintiff-in-Error, for a Writ of Mandamus directed to the Empire City Subway Company (Limited), Defendant-in-Error. Petition in error. J. Aspinwall Hodge, Attorney for Plaintiff-in-Error, Hanover Bank Building, 5 Nassau Street, Borough of Manhattan, New York City.

Supreme Court of the United States.

In the Matter of the Application of THE NEW YORK ELECTRIC LINES Company, Plaintiff in Error, for a Writ of Mandamus Directed to the Empire City Subway Company (Limited), Defendant in Error.

Assignment of Errors.

The Plaintiff in Error, New York Electric Lines Company, a corporation duly existing under the laws of the State of New York, respectfully presents to this honorable Court its Assignment of Errors.

I. The determination of the Court of Appeals of the State of New York that the resolution of the Board of Estimate and Apportionment of the City of New York of May 11, 1906, purporting to revoke the resolution of the Common Council of the City of New York of April 10th, 1883, is valid and effective, is contrary to, and in violation of, and in contravention of, the laws and constitution of the United States; in that it deprives the plaintiff in error of its property without compensation and without due process of law, and is an impairment by the State of New York of the obligations of the contract held by the plaintiff in error with the State and with the City of New York, which is evidenced by the Acts of the Legislature of the State, by the charter of the Company, and by the resolution of the Common Council of April 10th, 1883, and the acceptance thereof by the plaintiff in error of April 16th, 1883.

II. The said Court further erred in holding that the said contract and the contractual rights of the plaintiff in error, was a license merely, revokable at the pleasure of the City unless it had been accepted and some substantial part of the work contemplated by the permission and thus forming a consideration, had been performed; said ruling being an impairment of the obligations of the contractual rights of the plaintiff in error and deprivation of its property without compensation and without due process of law, in violation of the Constitution of the United States.

III. The said Court further erred in holding that the plaintiff in error failed to do any substantial part of the work contemplated by its franchise, or any work in reliance upon its said franchise, or any work constituting a consideration for the contract held by the plaintiff in error with the State and with the City of New York; said ruling being an impairment of the obligations of the contractual rights of the plaintiff in error and deprivation of its property without compensation and without due process of law, in violation of the Constitution of the United States.

IV. Said Court further erred in holding that the right of the plaintiff in error to place its wires in the streets of the City of New York was not complete upon acceptance by the plaintiff in error of the consent of the City on April 16th, 1883, and did not amount to an irrevocable franchise; said ruling being an impairment of the obligations of the contractual rights of the plaintiff in error and

deprivation of its property without compensation and without due process of law, in violation of the Constitution of the United States.

V. The said Court further erred in refusing to hold that the plaintiff in error, by its acceptance of the grant from the State and the consent of the City, followed by the expenditure of money, incurring of obligations, entering into contracts, and by attempting to build its conduits and to lay its wires in the conduits of the defendant in error, has acquired the same rights that actual construction of the conduits would give it; said ruling being an impairment of the obligations of the contractual rights of the plaintiff in error and deprivation of its property without compensation and without due process of law, in violation of the Constitution of the United States.

VI. The Court further erred in refusing to hold that the attempted revocation of the franchise of the plaintiff in error was ineffective, because it was an act of the City, and no power of revocation had been delegated by the State to the City, and no right to revoke this consent was reversed by the State, or by the City; said ruling being an impairment of the obligations of the contractual rights of the plaintiff in error and deprivation of its property without compensation and without due process of law, in violation of the Constitution of the United States.

VII. The Court erred in refusing to hold that the attempted revocation by the City of its consent theretofore given and the attempted revocation of the franchise of the plaintiff in error was ineffective because without notice to the plaintiff in error; said ruling being an impairment of the obligations of the contractual rights of the plaintiff in error and deprivation of its property without compensation and without due process of law, in violation of the Constitution of the United States.

VIII. The Court erred in refusing to hold that the State of New York and the City of New York, by acts of recognition and acquiescence have ratified the grant to the plaintiff in error of its franchise; said ruling being an impairment of the obligations of the contractual rights of the plaintiff in error and deprivation of its property without compensation and without due process of law, in violation of the Constitution of the United States.

IX. The Court erred in holding that the rights of the plaintiff in error have not been impaired by the resolution of the Board of Estimate and Apportionment of the City of New York of May 11th, 1906, and in failing to hold that the rights of the plaintiff in error have been impaired by said resolution; said ruling being an impairment of the obligations of the contractual rights of the plaintiff in error and deprivation of its property without compensation and without due process of law, in violation of the Constitution of the United States.

X. The Court erred in failing to remit said cause to the Supreme Court of the State of New York, with instructions or to enter an order providing that a writ of mandamus issue commanding the Empire City Subway Company (Ltd.) to grant the application of the plaintiff in error dated June 7th, 1910, to be accorded space for its electrical conductors in the conduits of the said Empire City Sub-

way Company, together with the necessary laterals and connections for block and building distribution, in accordance with the said application of the plaintiff in error, and further commanding said Empire City Subway Company to forthwith give and provide every facility to plaintiff in error to place its wires under the streets in proper conduits to be furnished by the said Subway Company in each part of the territory referred to in said application.

XI. The Court erred in affirming the order of the Appellate Division of the Supreme Court of the State of New York, appealed from.

XII. The Court erred in not reversing the order of the Appellate Division of the Supreme Court of the State of New York, appealed from.

XIII. The Court erred in denying the peremptory writ of mandamus prayed for by plaintiff in error.

XIV. The Court erred in finding in favor of the defendant in error.

XV. The Court erred in not finding in favor of the plaintiff in error.

September 9th, 1912.

J. ASPINWALL HODGE,
Attorney for Plaintiff in Error.

[Endorsed:] Supreme Court of the United States. In the Matter of the Application of The New York Electric Lines Company, Plaintiff-in-Error, for a Writ of Mandamus directed to the Empire City Subway Company (Limited), Defendant-in-Error. Assignment of Errors. J. Aspinwall Hodge, Attorney for Plaintiff-in-Error, Hanover Bank Building, 5 Nassau Street, Borough of Manhattan, New York City.

Supreme Court of the United States.

In the Matter of the Application of THE NEW YORK ELECTRIC LINES Company, Plaintiff in Error, for a Writ of Mandamus Directed to the Empire City Subway Company (Limited), Defendant in Error.

STATE OF NEW YORK,
County of New York, ss:

Charles F. Novotny, being duly sworn, deposes and says:

That he is a clerk in the office of J. Aspinwall Hodge, the attorney for the New York Electric Lines Company, and that on the 18th day of October, 1912, at No. 37 Wall Street, Manhattan, New York City, he served a copy of the annexed citation on Blandy, Mooney & Shipman, attorneys for the Empire City Subway Company (limited) by delivering to and leaving a copy of the same with Charles T. Rowe, a member of said firm.

CHARLES F. NOVOTNY.

Sworn to before me this 18th day of October, 1912.

[Seal of Alexander Holtzoff, Notary Public, New York County.]

ALEXANDER HOLTZOFF,
Notary Public, # 231, N. Y. C.

THE UNITED STATES OF AMERICA, *ss:*

To Empire City Subway Company (Limited), Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of New York, in and for the County of New York, wherein The New York Electric Lines Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, this 16th day of October, in the year of our Lord, One thousand nine hundred and twelve.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. In the Matter of the Application of The New York Electric Lines Company, Plaintiff-in-Error, for a Writ of Mandamus directed to the Empire City Subway Company (Limited), Defendant-in-Error. Citation. J. Aspinwall Hodge, Attorney for Plaintiff-in-Error, Hanover Bank Building, 5 Nassau Street, Borough of Manhattan, New York City.

Service of a copy of the within citation is hereby admitted.
Dated, October 18, 1912.

____ ____,
Attorney for Defendant in Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of New York, in and for the County of New York, possessed of the record in this cause by a remittitur from the Court of Appeals of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which was in the said Court of Appeals of the State of New York, the said Court of Appeals having sent by remittitur the said record back to you, and the same is now before you, or some of you, and the said Court of Appeals being the highest Court of law or equity of the said State in which a decision could

be had in the said matter of the application of The New York Electric Lines Company for a Writ of Mandamus directed to the Empire City Subway Company (Limited), wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, and Laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, of the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, manifest error hath happened to the great damage of the said The New York Electric Lines Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, Do Command You, if judgment be therein given that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 16th day of October, in the year of our Lord One Thousand nine hundred and twelve.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court
of the United States.

Allowed by
CHARLES E. HUGHES,
Associate Justice.

[Endorsed:] Supreme Court of the United States. In the Matter of the Application of The New York Electric Lines Company, Plaintiff-in-Error, for a Writ of Mandamus directed to the Empire City Subway Company (Limited), Defendant-in-Error. Writ of error. J. Aspinwall Hodge, Attorney for Plaintiff-in-Error, Hanover Bank Building, 5 Nassau Street, Borough of Manhattan, New York City. Received Oct. 22d, 1912.

STATE OF NEW YORK,
County of New York, ss:

Clerk's Office of the Supreme Court of the State of New York for the County of New York.

I, William F. Schneider, Clerk of the County of New York and of the Supreme Court of the State of New York, for the said County

of New York, by virtue of the annexed writ of error which was served upon me on the 22 day of October, 1912, and in obedience thereto, do hereby certify that the foregoing pages, numbered from 1 to 1214, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the suit In the Matter of the Application of The New York Electric Lines Company for a writ of Mandamus directed to the Empire City Subway Company, Limited, mentioned in said writ of error as the same remain of record and on file in my office, and that annexed hereto is the petition for the said writ of error, the assignment of errors, the Prayer of *Reverence*, citation to the writ of error with proof of service of the same, and said writ of error served upon me.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed at my office in the City and County of New York on the ——.

[Seal of New York.]

WM. F. SCHNEIDER, *Clerk.*

STATE OF NEW YORK,
Court of Appeals,
State Reporter's Office, ss:

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of Matter of Application of The N. Y. Electric Lines Co., &c., v. The Empire City Subway Co., Ltd., decided by the Court of Appeals on the 28th day of March, 1911, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this 18th day of October, 1912.

[Seal State of New York Court of Appeals.]

J. NEWTON FIERO,
As Reporter of the Court of Appeals
of the State of New York.

Attest:
[L. S.] R. M. BARBER,
Clerk of the Court of Appeals.

STATE OF NEW YORK,
Court of Appeals:

I, Edgar M. Cullen, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that R. M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official

opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and, I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of Matter of Application of The N. Y. Electric Lines Co., &c., v. The Empire City Subway Co., Ltd., decided by the said Court of Appeals on the 28th day of March, 1911, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of R. M. Barber, as clerk of said court, appended thereto is the true and genuine signature of said R. M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature, at the Chambers of said court, at the Capitol of said State, in the City of Albany and State of New York, on the 18th day of October, in the year of one thousand, nine hundred and twelve.

EDGAR M. CULLEN,
As Chief Judge of the Court of Appeals of the State of New York.

In the Matter of the Application of the NEW YORK ELECTRIC LINES Company, Appellant, for a Writ of Mandamus against The Empire City Subway Company, Limited, Respondent.

Appeal from an Order of the Appellate Division of the Supreme Court in the First Judicial Department, Entered November 25, 1910, which Affirmed an Order of Special Term Denying as Matter of Law and not in Discretion a Motion for a Peremptory Writ of Mandamus to Compel the Defendant to Admit and Assign Space in its Conduits for the Wires of the Petitioner.

The facts, so far as material, are stated in the opinion.

Alton B. Parker, Henry A. Gildersleeve, Jerry A. Wernberg and J. Aspinwall Hodge for appellant.

Alexander S. Bacon, Charles L. Withrow and Arthur N. Taylor for Great Eastern Telephone Company, intervening.

Edmund L. Mooney, John H. Cahill, Frederick A. Card and Charles T. Russell for respondent.

HAIGHT, *J.:*

The New York Electric Lines Company, which we will hereafter call the relator, was incorporated on the 14th day of October, 1882, under the provisions of chapter 265 of the Laws of 1848 and acts amendatory thereof and supplementary thereto, for the purpose of "owning, constructing, using, maintaining and leasing lines of telegraph wires or other electric conductors for telegraphic and tele-

phonic communication and for electric illumination, to be placed under the pavements of the streets, avenues and public highways of the cities of New York and Brooklyn in the State of New York."

On the 10th day of April, 1883, the board of aldermen of the city of New York adopted resolutions permitting the relator to lay its wires or other conductors of electricity in and through the streets, avenues and highways of New York City and to make connections of such wires or conductors under ground by means of the necessary vaults, test boxes and distributing conduits, and thence above ground to points of electric illuminations or telegraphic and telephonic signals, in accordance with the provisions of an ordinance passed by the common council and approved by the mayor December 14, 1878, which required, in substance, that the work should be performed under the control and supervision of the commission of public works. The permission, however, was granted upon the condition that the relator shall not transfer or dispose of the franchise granted without the further authority of the common council and upon the further condition that it will make no discrimination of individuals or corporations in the rental or use of its lines or wires and that the city, at its option, may require the relator to pay into the city treasury two per cent of its gross receipts derived from the rental of its wires under the franchise granted.

In December, 1878, an ordinance of the common council of the City of New York was adopted regulating the laying of subterranean telegraph and electric wires in the streets of the city, and subsequently the legislature, by chapter 534 of the Laws of 1884, required all telegraphic, telephonic and electric light wires and cables used in the city over the streets thereof to be placed under the streets within a time specified, and in case the owners thereof failed to so do the government of the city was directed to remove the wires and poles upon which they were placed from the streets of the city wherever found. In view, however, of the fact that no subways had been at that time constructed, into which the overhead wires could be placed, the legislature in the following year, by chapter 499 of the Laws of 1885, created a board of commissioners of electrical subways, which was authorized to adopt a plan for the construction of underground subways or conduits, through which electric wires may be conducted, and upon the construction thereof, to compel all companies having wires upon the streets to place the same in such subway or conduits. The board, after giving notice to the companies operating or intending to operate electrical conductors in the city, including the relator, to submit suitable plans for the adoption of the board for the carrying out of the provisions of the act, finally adopted a plan by which the city should enter into a contract with a company to construct conduits with ducts of sufficient number to supply the necessary requirements of the existing companies operating electrical wires, and also of such additional space as would probably be required in the future; and that upon the completion thereof companies operating wires upon the streets should be required to place the same in the ducts of the conduit

company, paying therefor such reasonable rental as should be determined between the company and the city.

Agreements were thereupon entered into by the commissioners with the Consolidated Telegraph and Electric Subway Company in 1886, which were, with some amendments and modifications, re-executed in 1887; and then, by chapter 716 of the Laws of 1887, the agreement, as so amended and modified, was expressly ratified and confirmed by the legislature; and after the passage of this act it was made unlawful for any corporation or individual to take up or excavate in any of the streets of the city for the purpose of laying underground electrical conductors, unless a permit therefor shall first be obtained from the board of electrical control. By chapter 263 of the Laws of 1892 it is further provided that "no such per-" mit shall be granted by said board unless, if the application be " for underground construction, there is an existing demand for " the construction of such conduits or subways; nor unless the occu-" pation of said conduits or subways is reasonably assured, and the " public interests require the construction thereof." (Section 2) These provisions, by the express terms of the statute, were made police regulations, thus preventing the streets from being constantly opened and occupied by every company having a franchise to maintain electrical wires over or under the streets of the city.

In 1891 a further contract was entered into pursuant to the provisions of chapter 231 of the Laws of 1891 relating to high tension wires, and, contemporaneously therewith, a further agreement with the Empire City Subway Company, which relates to conduits of low tension wires, was executed in behalf of the city with such companies. Under the latter contract it is provided that a space in its subways, conduits and ducts shall be leased by it to any company or corporation "having lawful power to operate telegraphic or telephonic conductors in any street or avenue of the City of New York."

The resolution of the common council of April 10, 1883, giving the relator permission to lay wires or other electrical conductors underground, was revoked by the board of estimate and apportionment May 11, 1906, which board had succeeded to the powers of the common council pertaining thereto.

The law of 1885 was subsequently amended by chapter 716 of the Laws of 1887, in which the board of commissioners of electric subways was dispensed with and the powers and duties of the commission were devolved upon a board of electrical control, and subsequently such duties, by further amendment, have been transferred to the commissioner of water supply, gas and electricity.

In 1886, after the commission had rejected the bid of the relator and awarded the contract to the Consolidated Telegraphic and Electric Subway Company, the relator demanded of the commissioner of public works a permit to open the streets and to lay its subway under the resolution of the board of aldermen adopted in 1883, to which we have already alluded. This application was denied, and thereupon a motion for a peremptory writ of mandamus was made to the Court of Common Pleas, which was denied, and

such denial was subsequently affirmed in the General Term of that court, in this court and in the United States Supreme Court. (1 N. Y. St. Repr. 633; 6 id. 281; 107 N. Y. 593; 145 U. S. 175.)

Again, in 1906, a further application was made to the Supreme Court for a mandamus to compel the commissioner of water supply, gas and electricity to grant the relator leave to open the streets and construct its subway, which was also refused, and the decision so rendered reviewed in 115 App. Div. 254, and in this court (188 N. Y. 523), in which cases it has been held that the legislation of 1885 and 1887, under which a plan was adopted by the board of commissioners of electrical subways for the construction of a subway of conduits through which all companies authorized to transmit electric currents over the streets of the city were required to insert their wires, paying a reasonable rental therefor, was a valid exercise of the police powers of the legislature, and that the relator, having neglected to construct the subway under the permit granted by the common council of the city until after the passage of the act of 1885 and the adoption of the conduit system, no longer had the right to construct its subway under the permission granted by the common council. That question must, therefore, now be deemed finally settled and disposed of.

The question now remaining to be determined is as to whether the relator, under the resolution of the common council of April, 1883, has the right, as a matter of law, to have its wires inserted in the ducts of the Empire City Subway Company, notwithstanding the revocation of such resolution. By referring to the provisions of the relator's charter we find that it was incorporated for the purpose of owning, constructing, using, maintaining and leasing lines of telegraph wires or other electrical conductors for telegraphic and telephonic communication and for electrical illumination to be placed under the pavements of the city. The resolution of the common council permitted the relator to lay its wires or other conductors of electricity in and through the streets, and to make connections of such wires underground, by means of necessary vaults, test boxes and distributing conduits, and thence above ground to points of electrical illuminations and telegraphic and telephonic signals, for which the relator agreed to pay to the city two per cent of its gross receipts derived from the rental of its wires. It will thus be observed that the main purpose of the relator's incorporation and of the permit granted by the city was to construct underground passages for the laying of wires or electrical conductors for the purpose of renting to persons or corporations having the power to conduct the business of electric lighting, telegraphing or the maintaining of telephonic communication. It is not pretended that the relator ever had a wire strung or operated over the streets of the city, nor that it had ever entered into any business of telegraphing, telephoning or electric lighting. It does not now ask the right to place its wires in the electrical conduits for the purpose of conducting the business itself of telegraphing or the making of telephonic communication. What it seeks to do is to have its wires entered for the purpose of renting them to another company which desires to engage in such

business. The case is, therefore, clearly distinguishable from that of the Matter of Long Acre El. L. & P. Co. (188 N. Y. 361); for in that case the company had not only a franchise but was actually engaged in lighting the streets with electricity at the times its poles were ordered removed and its wires placed underground. There being no conduits under the streets in which it was operating its franchise it was compelled to wait until such time as the streets were provided with conduits. It then asked for leave to insert its wires, and under those circumstances the relief was granted. But in this case the conduits were constructed in 1886 and 1887. This application was made in July, 1910, a delay of twenty-three years. In the meantime the legislature, as we have seen, had by various enactments provided for the establishing of a plan by which all electrical wires should be placed underground, and expressly prohibited interference with the streets by any other company or person without the consent of the board of electrical control or other board created by the legislature which had been invested with the powers of such board. The legislature, therefore, has itself practically annulled the resolution passed by the common council giving the relator a permit to construct underground subways for electrical wires or conductors, and its power so to do has been affirmed, as we have seen, not only in this court, but in the Supreme Court of the United States. In view of the fact that the relator has never attempted to engage in the business of electric lighting, or of supplying transmitters and receivers for telephonic communication, or of instruments for telegraphing, and has never been granted a franchise to occupy the conduits therefor, the contention that it may now do so under the old resolution of the common council of 1883, we think, would be giving to it powers not embraced in or contemplated by the resolution and should not now be adopted or sanctioned.

After the passage of the resolution of the common council in April, 1883, the relator formally accepted the same in writing and subsequently filed a map of the streets of the city which it proposed to occupy for subway purposes. While it expended a considerable sum of money in procuring patents and making experiments, it is not claimed a single stone was removed from the pavements of the streets or a foot of conduit constructed under the permission granted for the insertion of electrical wires or conductors. The question thus arises as to whether a bare acceptance of the permit granted by the resolution of the common council amounted to an irrevocable franchise granted by the city. Clearly, in the absence of partial performance under the permit, by which some vested interest in property is acquired, the state does not become bound by such permit, for that has been established by the decisions that have already been rendered in this and the Supreme Court of the United States with reference to this relator's right in the matter. Of course, the legislature of the state, under the authority of Trustees of Dartmouth College v. Woodward (4 Wheat. 518), has no power to take from a private corporation its vested property rights; but its power in directing the use of public streets and highways throughout the state is

without limit, and instead of exercising the power directly it may authorize it to be executed by local authorities.

In the case of People v. Squires (14 Daly, 154), Allen, J., says, with reference to the power of localities in granting privileges for the use of the public streets: "Until such grant has been accepted and acted upon it is a mere revocable license and may be recalled at pleasure; but after it has been accepted and acted upon it becomes a contract within the meaning of the clause of the constitution which secures the inviolability of contracts, by declaring that no state shall pass any laws impairing their obligation." In the subsequent reviews of this case in the Court of Appeals and in the Supreme Court of the United States, to which we have already alluded, no question is made with reference to the correctness of the foregoing statement as an abstract proposition of law. But at that time there had been no revocation of the permit granted by the resolution of the common council of April, 1883. This question was again considered by Justice Ingraham in the case of People ex rel. N. Y. Electric Lines Co. v. Ellison (115 App. Div. 254), in which he contended that, in order to constitute a contract between the city and the relator, there must not only exist an acceptance but the doing of some act by way of performance under the permission in order to constitute a consideration making the contract binding, and that otherwise the permission would be but a license merely, revocable at the pleasure of the city. But in that case the demand for the privilege of opening the streets was made before the resolution of the common council had been revoked and the question was not then further considered. But now it appears that the revocation was made before these proceedings were instituted and it, therefore, becomes necessary to consider the question.

In the case of Capital City Light & Fuel Co. v. Tallahassee (186 U. S. 401) Mr. Justice Peckham, in speaking for the court with reference to the privilege granted by the city of Tallahassee of the use of its streets for lighting purposes, says that "such grant does not become a contract or a vested right so as — be protected by the constitution of the state or the United States, until the company has, to say the least, begun to do the thing required by the charter as a consideration for the grant of such privilege." (P. 411).

In the case of Pearsall v. Great Northern Ry. Co. (161 U. S. 646) Mr. Justice Brown, in considering many cases bearing upon the subject of privileges granted to corporations, says with reference to such privileges to be protected as a contract "must also be founded upon a good consideration. If it be a mere nude pact, a bare promise to allow a certain thing to be done, it will be construed as a revocable license." (p. 667). He then refers to the cases of Rector, etc., of Christ Church v. County of Philadelphia (24 How. (U. S.) 300); Turnpike Co. v. Illinois (96 U. S. 63), and Philadelphia & Gray's Ferry P. Ry. Co.'s Appeal (102 Pa. St. 123). Substantially the same doctrine was reiterated by him in the case of Louisville & N. R. R. Co. v. Kentucky (161 U. S. 677). (See, also, City Ry. Co. v. Citizens' St. R. R. Co., 166 U. S. 567; Postal Tel. Cable Co. v. Baltimore, 156 U. S. 210; St. Louis v. W. U. Tel. Co., 148 U. S. 92,

103, and Chicago City Ry. Co. v. People ex rel. Story, 73 Ill. 541). While it is not our custom to cite Special Term decisions, in view of the fact that the justice rendering it has now become a member of this court, we also call attention to the case of Western Union Telegraph Co. v. City of Syracuse (24 Misc. Rep. 338), in which Hiscock, J., says: "It seems to be quite equitable and pretty thoroughly settled that a franchise thus granted by a municipal corporation and acted upon and lived up to by the party receiving it, should be and is in effect a contract, and that the privileges secured by such franchises are property rights which, standing upon the same general basis as other property rights, may not thereafter be withdrawn, impaired or violated by the municipality granting them." (p. 341) We thus have the converse of the proposition under consideration, which is based upon the fact that the franchise has been acted upon and lived up to.

We are aware that there are many cases in which the granting of a franchise and its acceptance is spoken of as creating a right of property, but generally in those cases there had been partial performance and the question now presented was not raised. We are also aware that there are cases which tend to support the doctrine that a forfeiture of a franchise can only be adjudicated at the instance of the state, acting through its attorney-general. But the question now presented is not one of forfeiture.

It is as to whether the consent ever amounted to more than a revocable license. During the preceding generation, franchises in the streets of our cities were considered of but little or no value and were readily given away to those promising public service benefits. Now they have become of immense value and the public have become deeply interested in having and enjoying the benefits derived therefrom. We have, therefore, called attention to the more recent decisions of our courts for the purpose of showing their tendency with reference to the granting away of the rights of the public, especially so far as our streets and highways are concerned. And why are they not right? Should a public service corporation be permitted to acquire an irrevocable franchise by mere acceptance without spending a dollar by way of performance, and then hold up the public in its enjoyment of the privileges contemplated by the grant indefinitely, or until they can be bartered away for a fortune? Should the municipalities to whom the legislature has delegated the right to grant permits for the use of their streets for public service purposes be denied the power to revoke licenses granted in case of failure of the grantee to render substantial performance? We think not. No reasons for the deprival of the municipalities of such power are suggested and none are apparent to our minds. We, therefore, incline to the view expressed by the trial court that the mere granting of a permit by a city to a corporation to use the streets for a purpose, is a license merely, revocable at the pleasure of the city, unless it has been accepted and some substantial part of the work performed contemplated by the permission sufficient to create a right of property and thus form a consideration for the contract. We, consequently, conclude under the circumstances of this case, that the board of

estimate and apportionment had the power to and did revoke the permit granted to the relator under date of April 10th, 1883.

The order should be affirmed, with costs.

Vann, Willard, Bartlett, Hiscock, Chase and Collin, JJ., concur; Cullen, Ch. J., not sitting.

Order affirmed.

Supreme Court of the United States, October Term, 1912.

829.

THE NEW YORK ELECTRIC LINES COMPANY, Plaintiff in Error,
against
EMPIRE CITY SUBWAY COMPANY (LTD.), Defendant in Error.

In the above case it is mutually agreed between the parties signing this stipulation that the transcript of the record sent up by the Clerk of the Supreme Court in and for the County of New York, State of New York, shall be printed as sent up, except that manuscript pages 1201 to 1206, inclusive, and 1209 of the record, which are duplicates of other portions of the record, may be omitted.

J. ASPINWALL HODGE,
For Plaintiff in Error.
EDMUND A. MOONEY,
For Defendant in Error.

Dated New York, November 10, 1912.

[Endorsed:] 829/23,404.

[Endorsed:] File No. 23,404. Supreme Court U. S., October Term, 1912. Term No. 829. The New York Electric Lines Co., Pl'ff in Error, vs. Empire City Subway Company, Limited. Stipulation to omit parts of record in printing. Filed November 13, 1912.

Endorsed on cover: File No. 23,404. New York Supreme Court. Term No. 829. The New York Electric Lines Company, plaintiff in error, vs. Empire City Subway Company, Limited. Filed October 25th, 1912. File No. 23,404.

No. 63

Supreme Court, U. S.
FILED
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JAMES D. MAHER
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In the

Supreme Court of the United States

OCTOBER TERM, 1912.

No. [redacted]

THE NEW YORK ELECTRIC LINES COMPANY,

Relator-Plaintiff-in-Error,

vs.

EMPIRE CITY SUBWAY COMPANY,

Respondent-Defendant-in-Error.

BRIEF FOR RELATOR-PLAINTIFF-IN-ERROR.

J. ASPINWALL HODGE,
Attorney for Plaintiff-in-Error.

ALTON B. PARKER,
HENRY A. GILDERSLEEVE,
J. ASPINWALL HODGE,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1912.

No. 829.

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Plaintiff-in-Error,

vs.

EMPIRE CITY SUBWAY COMPANY,
Respondent-Defendant-in-Error.

In Error to the Supreme Court of the State of New York.

BRIEF FOR RELATOR-PLAINTIFF IN ERROR.

Statement of Case.

This is a writ of error to the Supreme Court of the State of New York upon an application for a writ of mandamus. The controversy is directly between two New York corporations.

The respondent is under contract with the City of New York, by authority of the State, to build and provide subways, conduits and ducts in the City for telegraph and telephone conductors, and electric illumination, and to lease space therein to any other corporation having lawful authority to use and operate such conductors, on application of such company therefor.

The relator, claiming to have such authority, applied to respondent for such a lease, but the application was denied, and relator applied to the New York Supreme Court for this writ to compel respondent to make the lease.

Application for the writ was denied on the ground that the permission of the City to relator to lay and operate its conductors in the streets was a mere license, which the City might revoke, at its pleasure, and had assumed to revoke, without notice to relator, or affording it any opportunity to be heard.

We deny that proposition, and claim that such permission was and is a part of relator's franchise, a contract and property; and that the obligation of the contract has been impaired by the State, and the relator's property taken without due process of law.

This case turns upon that question—**whether the grant of the city to relator to use the streets was a mere revocable license or a contract and property, not to be impaired or destroyed by the state or city.**

The Facts.

I. **Incorporation.**—The relator was incorporated Oct. 14, 1882, for the express purpose "*of*

*owning, constructing, using, maintaining, and leasing lines of telegraph wires or other electrical conductors for telegraphic and telephonic communications and for electric illumination, to be placed under the pavements of the streets, avenues and public highways of the cities of New York and Brooklyn, * * * and for the purpose of owning franchises for laying and operating the said lines of electric conductors, and the purchasing, owning and disposing of such real estate within said cities, and such personal property as may from time to time be necessary and convenient to the building, using, maintaining and leasing the said lines of electric conductors upon the terms and conditions and subject to the liabilities in the act of the legislature of the State of New York passed April 12th,* 1848, * * * *and the several acts amendatory thereof and supplementary thereto* * * *"* (fols. 141, etc.).

It is to be noted that this charter provided for wires "under" but not over the streets of the city.

II. **Prior Statutes.**—(a) The act of 1848, *supra*, was a general law authorizing the construction of telegraph lines "*along and upon any of the public roads or highways, * * * within the limits of the State, * * * provided the same shall not be constructed as to inconvenience the public use*" thereof.

(b) *Chapter* 471 *of the Laws of* 1853, amending the act of 1848, extended the right to construct such lines "*upon, over or under any of the public roads, streets or highways*" of the State subject to like restrictions.

(c) *City Charter.*—Chapter 335 of the Laws of 1873, in force in April, 1883—provides, among

other things: "Sec. 2. The legislative power of said corporation (the city) shall continue to be vested in the board of aldermen, * * * *hereby declared to be the common council.* * * *

"Sec. 9. Every legislative act of the common council shall be by *resolution* or *ordinance.* * * *

"Sec. 17. The common council shall have power," etc., 1 * * * (general powers to lay out, open, alter and repair the streets). "5. *To regulate the opening of street surfaces, the laying of gas and water mains, the building and repairing of sewers, and the erecting of gas lights.*" (d) *Chapter* 483 *of the Laws of* 1881, authorized any company so incorporated "*to construct and lay lines of electrical conductors underground in any city,* * * * *provided, that any such company shall, before laying any such lines in any city,* * * *first obtain from the common council,*" thereof "*permission to use the streets*" for such purposes.

III. **Permission from the City.**—On April 10, 1883, within less than six months after its incorporation, relator obtained from the common council of the City of New York, the following permission:

"RESOLVED, *that permission be and hereby is granted to the New York Electric Lines Company* (the present relator) *to lay wires or other conductors of electricity in, and through, the streets, avenues and highways of New York City and to make connections of such wires or conductors underground by means of the necessary vaults, test bores and distributing conduits, and thence above ground with points of electric illuminations or of*

telegraphic or telephonic signals in accordance with the provisions of an ordinance to regulate the laying of subterranean telegraphic wires and electric conductors in the streets of the City passed by the common council" Dec. 14, 1878 (fol. 173). * * *

This grant also provides that the relator, *"as a further compensation for the opening and use of the streets of the City, shall pay into the City Treasury, within ten days after taking up the payments, for each one thousand feet in length of trench, to be excavated,"* certain maximum sums of money, and is conditioned that the relator, *"shall not transfer or dispose of the franchise hereby granted without the further authority of the common council, and that it will make no discrimination of individuals or corporations in rental and use of its lines or wires which may be laid down hereunder"* (fols. 176-7). * * *

THE ORDINANCE OF 1878, mentioned above, is a general one regulating the method of laying wires under the streets, and provides that: *"Grantees under this ordinance shall be required within six months after such permission shall be granted to file with the county clerk maps, diagrams and tabular statements indicating the amount and position of the spaces proposed to be occupied by them, and their rights and privileges upon this ordinance shall be confined to the spaces, positions and localities as indicated by said maps, diagrams and statements"* (fols. 185-9).

Further, that whenever routes of several wires shall be laid, *"one wire in each route shall be reserved for the use of the Police and one for the Fire Alarm Telegraph and the use of the same*

shall be donated to the City and County of New York by the parties laying such lines or wires free of any price or charges therefor" (fol. 189).

The City, in granting relator's franchise, reserved the option to require it, after January 1, 1885, "*to pay into the City Treasury two per cent. of its gross receipts from the rental of wires under the franchise hereby granted in lieu of the donation of the two wires*" provided for by the general ordinance of 1878, supra (fol. 178).

IV. **Acceptance by relator.**—On the 24th day of April, 1883, the relator presented a communication to the Board of Aldermen, which, after reciting prior proceedings, continues: "*Now, therefore, the said New York Electric Lines Company by these presents accepts the franchise as contained in the ordinance and resolutions adopted by the Honorable the Board of Aldermen, April* 10, 1883, *and agrees to, assumes and obligates itself in the observance of all the requirements, provisions, restrictions, conditions and limitations contained in said last mentioned ordinance as adopted April* 10, 1883, *as well also as to the provisions, conditions and obligations of the said general ordinance*" of 1878 (fols. 180-183).

V. **Action of City on the acceptance.**—This acceptance was ordered on file at the time it was presented. Subsequently the Common Council adopted a motion of one of its members that the communication of the Lines Company, "*accepting the grant of the City presented in the Board April* 24, 1883, *and ordered on file, be taken from on file and printed in full in the City Record and in the minutes,*" and it was done (fol. 180).

VI. **Filing maps and diagrams.**—On the 18th day of May, 1883, the relator at an expense of $300 (fols. 264-5) in compliance with the ordinance of 1878, supra, filed with the county clerk maps, diagrams and tabular statements indicating the amount and position of the spaces in certain streets proposed to be occupied by it (fols. 35, 190-209).

VII. **Performance by the Relator.**—(More fully stated in Point II, p. 50, post). The relator organized in October, 1882, immediately after its incorporation, and, besides the making and filing of the maps, etc. as required by the terms of its franchise (supra, VI), at once began the business for which it was incorporated (fols. 46, 288). The matter of electrical insulation of wires, as well as that of their protection from moisture and other elements, was then in an experimental stage (fol. 46). The relator, therefore, having first opened an office on Gold Street, and on May 1, 1883, on Wall Street (the latter at a rental of $1,500 a year), and a factory at Greenwich Street, all in the City of New York (fol. 256), began, immediately, to secure inventions and patent rights thereon (fols. 47, 258, 290), some 17 of which patents were acquired (fols. 275-9), in its efforts to overcome these difficulties.

It is also engaged, at once, in the difficult business of manufacturing and testing of insulated wires, conduits and other devices and appliances (fol. 48), and the construction of cables, conduits and other materials for underground equipment, and continued in these efforts, business and work, year after year (fols. 257-263, 285-8, 293-4, 308-

311), at an expense during the first year of its corporate existence, of approximately $50,000 (fols. 261-2, 294); of over $75,000 prior to 1900 (fol. 51), contributed by the stockholders (fol. 287); and of over $400,000 since that time, in the prosecution of the company's business (fols. 88-90).

Besides, relator, in reliance upon its franchise, has entered into upwards of one hundred thousand contracts with residents of New York City, also contracts with other companies to supply them with telephonic service and facilities, at rates 40 to 60 per cent. less than the rates now charged (fol. 327), by wires to be installed in the conduits of the respondent, Empire Company (fols. 50-2, 87-9, 319, etc.).

Not only so, the relator has been assessed with, and has paid, its State, County and City taxes from the time of its incorporation to the present, including a special tax on its franchise, since the imposition of that tax in 1896 (fols. 51, 84-7, 272). The original amount of this special tax with which relator was assessed does not appear, but it does appear that it was assessed with and paid an increase of $9,000 on its franchise tax in 1903 (fols. 85-6).

VIII. **Subsequent legislation and municipal contracts.**

(a) *Chapter* 534 *of the Laws of* 1884 directed that all such wires, etc., as are in question here, should be placed under the surface of the streets.

(b) CHAPTER 499 OF THE LAWS OF 1885 directed the appointment of a Board of Commissioners of Electrical Subways and charged it with the responsibility of enforcing the act of 1884.

Section 3 of the Act of 1885 provides that, "*When any company, operating or intending to operate electrical conductors in any such city, shall desire or be required to place them under ground, * * * it shall be obligatory upon such company to file with said Board of Commissioners a map or maps, made to a scale, showing the streets or the avenues or other highways which are desired to be used for such purposes, and giving the general location, dimensions and course of under ground conduits desired to be constructed. Before any such conduits shall be constructed, it shall be necessary to obtaine the approval by said Board of such plan of construction so proposed by such company; * * *.*"

Section 4, having made it the duty of the board to require electrical conductors to be constructed underground, continues: "*provided no suitable plan is proposed or in use, within sixty days after the passage of this act, it shall be the duty of such board to cause to be devised and made ready for use such a general plan as will meet the requirements of said act* (of 1884) *and of this act, and the board shall have full authority to compel all companies operating electrical wires to use such subways so prepared in accordance with the provisions of this act.*"

(c) CONTRACT OF 1886.—The board, after notice to companies operating or intending to operate electrical conductors, in the city, including the relator, to submit plans for carrying out of the provisions of the act, finally adopted a plan by which the city should enter into a contract with a company to construct the necessary conduits, etc., and requiring other companies to use them (201 N. Y., 326-7). Therefore, and on July 22,

1886, the commissioners of electrical subways entered into an agreement, amended April 7, 1887, with the Consolidated Telegraph and Electric Subway Company for the building of subways for electrical conductors in the City of New York, and under which certain subways were built (fols. 93-4).

(d) THE ACT OF 1887, CHAPTER 716, created a Board of Electrical Control for the City of New York, and conferred upon it all the powers and duties of the original general board or commissioners of 1885, in respect to that city, as well as all the powers and duties theretofore conferred upon the city itself, by any law, in relation to the placing, building, etc., of electrical subways and conductors in the city, and, by Section 6, "*ratified and confirmed*" the agreement and its amendment (just mentioned), *subject, however, to all the provisions of this act.*"

Section 7 provides that, whenever it shall be made to appear to the satisfaction of certain judges, justices or courts, that "*the said board constituted by this act or its successors,* * * * *or the said The Consolidated Telegraph and Electrical Subway Company or any corporation or persons claiming under the said board or its successors, or under the said Company, shall have violated or shall have failed to observe and fully perform or to carry into full effect all or any of the provisions of this act or either of the acts hereinbefore mentioned* (Ch. 499, Laws 1885, and all laws conferring powers or duties upon the City in respect to electrical subways and conductors), *or of the said agreement, or shall have failed to*

furnish just and equal facilities under this act or the said agreement to any and all corporations lawfully competent to manufacture, use or supply electricity, or to operate electrical conductors in any street, avenue or highway in the City of New York, applying for such facilities upon terms that to the court may seem just and reasonable, then and in every such case said judge, justice or court may, by proper proceedings in the nature of a writ of mandamus or by mandamus, enforce the provisions of this act or of the acts before mentioned, or the said agreement or of any agreement made under said acts, or compel the granting of such facilities, or may grant such relief as may be proper in the premises. And the said board or its successors, or the Mayor, aldermen and commonality of the City of New York, or any person, company or corporation aggrieved by any such violation or failure as aforesaid, shall be entitled to institute and maintain such proceedings as are by this section authorized."

(e) CONVEYANCE TO RESPONDENT.—On Dec. 8, 1890, the Consolidated Company, with the consent of the board and the City, conveyed to respondent all the low tension subways, conduits and conductors which it had constructed in the City, and applied to the board to be relieved from its obligation to maintain the same, or to build other low tension subways and its agreement was so modified (fol. 95, etc.).

(f) CHAPTER 231, LAWS 1891, authorized the Board of Electrical Control, with the consent of The Consolidated Telegraph and Electrical Subway Company, to enter into new contracts with said company and with respondent herein, the

Empire City Subway Company, providing for a division between them of the work of constructing subways in the city. The former to provide subways for high tension current such as is used for electric light and power, and the latter subways for low tension current used chiefly for telegraph and telephone service.

(g) CONTRACT OF RESPONDENT.—May 15, 1891, respondent entered into a contract with the Board of Electrical Control to maintain and provide subways, conduits and ducts for telegraph and telephone conductors, in certain specified streets of the City, on or before the first day of July of that year (fols. 99-101). And that: "*IV. The spaces in said subways, conduits and ducts shall be leased by*" this company "*to any company or corporation having lawful power to operate telegraph or telephone conductors in any street, avenue or highway in the City* * * *" if it or they shall apply for the same * * *" (fol. 105).

Further: "*If at any time the space in such subways, conduits or ducts shall not be sufficient for all companies so applying for the same* * * *the additional space needed shall be provided by*" respondent (fol. 107). Respondent agreed also to "*fix a fair scale of rents to be charged according to the kind of conductors and the amount of space required therefor*" * * * and which scale "*shall at all times be subject to the control, modification and revision of the*" board (fol. 109).

The board, having granted respondent the right to build such subways, etc., as the board might order it to build, agreed "*to use all lawful means within their power to compel authorized persons or companies using telegraph or telephone conductors* * * *to place their conductors in said sub-*

ways, conduits and ducts and to pay a fair rental for the space occupied therein * * * ." (fols. 125-6).

Respondent is, by virtue of the premises, in possession and control of the present system of subways, conduits and ducts for low tension electrical conductors in the streets of the city, and maintains and operates the same (fols. 30-1).

IX. **Alleged revocation of franchise.**—On May 11, 1906, the City, acting through one of its departments and with approval of the Mayor, but without notice to respondent, after reciting the previous grant of permission to relator, "RESOLVED, *that any and all rights or privileges to the use of the streets, if any such rights or privileges still exist, acquired by said New York Electric Lines Company under the permission granted said company by the said resolution of the board of aldermen passed April* 10, 1883, *be and hereby are revoked and terminated; and the resolution of the board of aldermen adopted on such date is hereby in all respects repealed and revoked*" (fols. 506-509).

X. **Amended charter.**—On July 7, 1907, relator obtained an amendment of its charter or certificate of incorporation authorizing it "to construct, lease, own, use and maintain lines of electrical conductors not described in its original certificate of incorporation, and in addition to those therein described, and to join with other corporations in constructing, leasing, owning, using and maintaining said lines, and to hold or own any interest therein, and to become lessees thereof, in accordance with the provisions of Article 8, Section 101, of the Transportation Corporations' Law

* * *." Then follows a specification of the general route of such lines not described in the original certificate (fols. 158, etc.).

Thus relator's franchise or contract, and its rights and title thereunder, were acquired and completed—a charter from the State, a permit from the City, the acceptance of both and part performance by relator, of all acts required to be performed by the terms of the permit and part performance of construction work in the exercise of its powers to lay and operate a telephonic systems of wires.

XI. **Application of relator for space.**—On or about June 10, 1910, the relator made a written application to respondent *"for space in its subways, together with the necessary laterals and connections for block or building distribution, for the purpose of placing electrical conductors therein, and connecting the same with the central office and the block and building in the territory adjacent thereto"* on certain specified streets in the City of New York (fols. 210-219). The application, accompanied by a tender of $5,000 rent for such space for the first year, stated that relator was *"prepared, ready, able and willing to furnish a bond with a good sufficient and satisfactory surety company, as surety, in such amount as may be required for the payment of such rent for an additional five years"* (fol. 220). Respondent acknowledged the tender of $5,000, but refused to take the money, or to grant the application (fols. 41, etc., 221, 225).

Hence the application for this writ.

XII. **Previous litigation.**—1. In September, 1886, relator applied for a writ of manda-

mus to compel the Commissioner of Public Works of the City to give it written permission to make excavations in the streets for the purpose of laying its wires and other conductors of electricity. The application was denied (14 Daly, 154), and this denial was affirmed by the Court of Appeals (107 N. Y., 593) and by this Court (145 U. S. 175), on the ground that the acts of 1885 and 1886 "transferred the supervision and control of the "matters of excavation of the streets and the con- "struction of underground electric systems from "the Commissioner of Public Works to the Board "of Subway Commissioners. That is the sum to- "tal of the change effected."

The relator claimed in that proceeding that its charter contract with the State and City was impaired by that Act of 1885. But this Court held otherwise, saying that the legislature had a right to require relator to submit its plans for approval, to the Board of Subway Commissioners.

This Court further held that the Act did not prevent relator *"from laying its lines and constructing its underground electrical system in accordance with the terms, and subject to the restrictions and conditions of its said contract with the City"* (145 U. S., 190).

2. In October of the same year, 1886, application was made to the Attorney-General to dissolve the plaintiff-in-error on the alleged grounds that it had not organized and commenced the transaction of business within one year, and for non-user, under Sections 1798 and 1808 of the Code of Civil Procedure. The application was immediately denied (fol. 59).

3. In January, 1906, another application was made to the Attorney-General "to destroy the cor-

porate existence of the company" (relator) as he put it (fol. 343). This application was also denied (fol. 363).

4. In May, 1906, relator applied for a writ of mandamus to compel the Commissioner of Water Supply, Gas and Electricity (the successor to the powers of the Board of Subway Commissioners) to grant relator permission to construct underground subways or conduits in certain streets of the City. The application was denied at Special Term on the ground that "the relator's franchise "has been so modified by competent legislation that "it cannot assert an individual right to operate its "own subway system; and, this assumed right be-"ing the sole basis of the application before me "I must hold that the papers do not justify the "granting of a right of mandamus." 51 Misc., 413, 418.

The Court of Appeals affirmed this denial and asserted that the essential purpose of relator incorporation and of the permission of April 10, 1883, *"was to lay electrical conductors, and its rights in that respect had not been materially or essentially violated or impaired * * * by said acts* (of the legislature) *and contracts"* (188 N. Y., 523, 526-7, 537).

Thus it was decided in that case that the relator no longer had the right *"to construct a duplicate system of subways,"* under the City's permission of 1883 (id., 527, etc.).

There thus remained the question which arises in the present proceeding and which is stated by Judge HAIGHT as follows:

> *"The question now remaining to be determined is as to whether the relator, under the resolution of the common council of April,*

1883, *has the right, as a matter of law, to have its wires inserted in the ducts of the Empire City Subway Company, notwithstanding the revocation of such resolution* * * * " (201 N. Y. R., 417).

After referring to the revocation noted above (IX *supra*) the learned Judge further said:

"The question now presented is not one of forfeiture. It is as to whether the consent ever amounted to more than a revocable license" (id., 420).

And, speaking for the Court, he answered that question in the negative, saying, after mentioning the fact that such street franchises were formerly of little or no value, and are now of great value, etc.:

"Should the municipalities to whom the legislature has delegated the right to grant permits for the use of their streets for public service purposes be denied the power to revoke licenses granted in case of failure of the grantee to render substantial performance? We think not. No reason for the deprival of the municipalities of such powers are suggested and none are apparent to our minds. *We, therefore, incline to the view expressed by the trial court that the mere granting of a permit by a city to a corporation to use the streets for a purpose, is a license merely, revocable at the pleasure of the city, unless it has been accepted and some substantial part of the work performed contemplated by the permission sufficient to create a right of property and thus form a consideration for the contract;"*

and

> *"that the board of estimate and apportionment had the power to and did revoke the permit* granted to the relator April 10, 1883" (id.).

The holding of the Trial Court (69 Misc., 200), thus approved, was solely based on a statement made in relator's previous proceeding (115 App. Div., 254, 263, supra), by Mr. Justice INGRAHAM, to the same effect, that the consent of the City creates no franchise or any contract *"until it is acted on by the grantee."* No decision of any Court or other authority of any kind is there cited or referred to in support of that statement; nor is there anywhere in the opinion any reference to the facts which appear upon the record showing that the relator had not only performed all that the ordinance demands, but had also as appears hereinafter, spent large sums of money in the prosecution of its business, and in the manufacture of materials.

POINT I.

The sole question, therefore, now is, whether relator's permit of 1883, from the city ever amounted to more than a mere revocable license, as held by the state courts, or was and is as we claim, an irrevocable franchise, contract, and property, not to be impaired by state law, nor taken without due process of law.

That question has been completely answered and settled in our favor by this Court since the decision

of the Court of Appeals herein in a very recent decision, *City of Louisville* vs. *Cumberland Telephone and Telegraph Company* (224 U. S., 649), as well as by many previous decisions of the Federal and State courts.

In that case (224 U. S.) the Ohio Valley Telephone Company was incorporated with power, among other things, to erect poles, string wires "and operate its telephone lines over, along or under any highway, street or alley in the City of Louisville, *with and by the consent of the General Council of said City.*"

The council gave its consent by an ordinance, August 17, 1886, stating that "the right is hereby granted and confirmed to the said Ohio Telephone Company, its successors and assigns to maintain a telephone system and to erect poles and string wires thereon; * * * and to operate its telephone lines over, along or under any street, alley or sidewalk in the City of Louisville;" regulating the manner of doing the work, and requiring the company to carry fire and police wires for the City free of charge, and to give a bond in the sum of $50,000 to save the City harmless from damage caused by the opening of the streets.

The company *accepted* the ordinance (manner not stated), installed its system, and maintained a telephone exchange in the City until 1900, when it consolidated with another company, and the present company purchased the property and succeeded to the rights of the consolidated company; gave a bond for $50,000, as required of the original company, and carried the police and fire wires for the City free of charge.

In 1908, differences arose between them, the City claiming that the methods of the company were dictatorial and oppressive, that it rendered poor

service at high rates, and discriminated among its patrons.

January 23, 1909, the council passed an ordinance repealing the ordinance of August 17, 1886, and the company sued the City, alleging that the repealing of the ordinance impaired the obligation of its contract and deprived it of its business and property without due process of law.

This Court held in that case that:

1. When the assent of the City was given the condition precedent had been performed, the franchise was perfected and could not thereafter be abrogated by municipal action (224 U. S., page 658). The statute gave the City no power to withdraw its consent; and, no attempt having been made to reserve such a right in the consent ordinance, the City could not by an ordinance impair that contract nor revoke the rights conferred (id., 658-9).

2. The franchises became fully operative when consent was given by the City and accepted by the company, which thereafter conducted its business, not under a license from the City, but by virtue of a grant from the State, which could not, of course, be repealed by any ordinance of the City (id., 659).

3. Such a street franchise has been called by various names, but, howsoever designated, it is property (id.)

4. To say that the right to maintain these appliances (telephone poles, wires, etc.), was only a license, which could be revoked at will, would nullify the charter itself, and defeat the State's purpose to secure a telephone system for public use (id., 663).

5. The grant was not at will, nor for years, nor terminable upon the happening of a future event, but it was a necessary and integral part of the other franchises conferred upon the company, all of which were perpetual and none of which could be exercised without the essential right to use the streets (id., 664).

6. Where such a grant to a corporation is not, by its terms, limited and revokable, the grant is in fee (id.).

FACTS COMPARED.

That decision leaves nothing whatever to discuss in the present case, unless there is a difference either (a) as to the rights or authority of the parties there and here, or (b) in the nature or character of the consents themselves. No such difference will be found, or exists, as we believe.

THE COMPANIES—Cumberland and Lines, we may call them,—incorporated for similar purposes, were possessed of powers of exactly the same character. Each company was expressly authorized directly by the state to acquire and own *franchises* and other property necessary for the purposes of its incorporation. The charter of the Lines Company even contains an express provision, among others, that it was incorporated "*for the purpose of owning franchises for laying and operating the said lines of electrical conductors*" in the cities of New York and Brooklyn (par. I, *supra*).

Each company was authorized directly by the State to use the streets for similar purposes, and upon precisely the same conditions,—promptly performed by each, that the obtaining and accepting the city's consent to so use them (224 U. S., 650; par. II (d), *supra*).

Not a word of discussion is needed to show that the companies were on an exact equality, being possessed of rights and powers of precisely the same legal effect.

THE CITIES.—The cities were on a like exact equality. Creatures of their respective states, they were possessed of just such powers, and none other, as were conferred upon them by state laws. The State of Kentucky, said the Court in that case, "not only had the sole right to grant franchises, but, without municipal consent, it could have authorized the company to use any and all streets in the city of Louisville" (224 U. S., 658). And so as to the State of New York. "The state might have," said the Court of Appeals, "granted the franchise (to lay gas mains in the City of New York) directly to the corporation without the consent of the local authorities, and has done so in many instances" (138 N. Y., 510, 513). Neither state, however, exercised that power in these cases, but left it to the cities to consent to the use of their streets. Even this was done by statutes of precisely the same character—the power being conferred indirectly in both cases. The State of Kentucky authorized the Cumberland Company to use the streets of Louisville *with and by the consent of the city council* (224 U. S., 658). The State of New York authorized the Lines Company to use the streets of New York, *provided it should first obtain permission* of the city council (par. II [d], *supra*), the words *consent* and *permission* meaning, of course, the very same thing in each instance. The Court said in the Kentucky case that the statute "gave the municipality ample authority to deal with the subject" (224 U. S., 658). Nothing less can be, or will be, said of the New York Statute.

THE CONSENTS.—Neither is there any difference in the formalities or solemnity with which the cities exercised their powers in granting, and in attempting to revoke these franchises, nor in the franchises themselves. Or if so, the difference is in favor of the Lines Company.

The City Council of Louisville, on August 17, 1886, ordained that *"the right is hereby granted and confirmed to the"* (Ohio) company to erect and operate its lines over, along or under the streets of the City of Louisville. The manner of doing so was specified; the company was required to give bond to save the city harmless, and it was to carry police and fire wires free of charge (224 U. S., 650).

The city council of New York, on April 10, 1883 (being authorized to act by resolution or ordinance, par. II [c], *supra*), *"Resolved, that permission be and hereby is granted to the"* Lines Company to lay its wires, etc., in and through the streets of New York City, and make connections thereof underground, etc., according to the provisions of the ordinance of 1878. This ordiance specified the manner of doing the work, and that *"Grantees"* thereunder should file maps, etc., of the space to be occupied, and donate police and fire wires to the city free of charge (par. III, *supra*). Continuing, the resolution of 1883 provides that the company, *"as a further consideration"* for opening the streets, "shall pay into the City Treasury, within ten days after taking up the pavements, for each one thousand feet in length of trench," certain maximum sums of money (par. III, *supra*).

THE ACCEPTANCES.—The Cumberland Company *accepted* the ordinance (time or manner not stated), and executed the required bond (224 U. S., 650).

The Lines Company, on April 24, 1883, presented to the common council an unconditional written acceptance *"of the said franchise as contained in the ordinance and resolution"* of April 10, 1883, and whereby also the company *"agrees to, assumes and obligates itself in the observance of all the requirements,"* etc., of that resolution and of the ordiance of 1878 (par. IV, *supra*). On the same day, the common council, by vote, adopted a motion of one of its members that this communication of the company *"accepting the grant of the city, * * * and ordered on file, be taken from on file and printed in full in the City Record and in the minutes,"* and this was done (par. V, *supra*).

PERFORMANCE.—The Ohio company constructed and maintained its telephone exchange until 1900, when the Cumberland Company purchased the property and succeeded to the rights of that company (224 U. S., 650-1).

The Lines Company, on May 18, 1883, in express compliance with its acceptance of the grant, filed the requisite maps, diagrams and tabulated statements, at an expense of $300 (pars. VI and VII, *supra*). And, entering immediately upon the further prosecution of its business, the company has ever since continued the same, or in its endeavors to do so, and at an additional expense and outlay of nearly or quite a half million dollars (par. VII, *supra*).

THE REVOCATIONS.—On January 23, 1909, the City of Louisville passed an ordinance declaring its consent repealed, twenty-two years and five months after granting it, and without instituting any proceeding, or any hearing in respect to the alleged repeal (224 U. S., 652).

On May 11, 1906, the City of New York (by one

of its departments and the Mayor) passed a resolution declaring its permission revoked and repealed (par. IX, *supra*), twenty-three years after granting it, and without instituting any proceeding, or any hearing in respect to the alleged revocation and repeal.

POWER OF REVOCATION NOT RESERVED.—The Kentucky statute gave the city authority to consent, but no power to withdraw that consent and no attempt was made to reserve such a right in the consenting ordinance (224 U. S., 658). "This grant was not at will, nor for years, nor for the life of the city," said the Court. "Neither was it made terminable upon the happening of any future event" (Id., 664).

Every word of the foregoing is literally true of the New York statute (par II [d], *supra*), and of the consenting resolution and grant (par. III, *supra*).

COMMENT.—Having re-stated the facts—at unnecessary length, it may be—we repeat that there is no difference as to the facts in these cases, either as to the rights or authority of the parties, or the nature or character of the consents themselves. It would, no doubt, be impossible to find another instance of such complete equality and identity of rights and powers, and of their exercise, as exist here, betwen two pairs, so to speak, of corporations and cities of different states, or even in the same state. In short, there is not a single fact or feature of substance, distinguishing the one city franchise, or its alleged repeal, from the other; nor even the one case from the other, as a whole, except the bare fact that the Cumberland Company was permitted, after the grant, to string and operate its wires; while the Lines Company was not permitted to do so.

It is, therefore, inconceivable that the one consent is a mere revocable license, and the other an irrevocable contract and property. Both were express *grants*. In the Kentucky case it was ordained that "the right is hereby *granted* and confirmed" to the company. In the New York case it was resolved "that permission be and hereby is *granted*" to the company. The grants were by cities having equal authority to make them, and to fix the terms and nothing more. Neither of them attempted to reserve the right to do anything more. The grants were to companies having equal rights and authority to accept and own them, and both companies duly accepted them. The Lines Company not only accepted, but expressly assented to, assumed and obligated itself in the observance of all the conditions of the grant. Nor did the matter stop there; for the city by a formal motion and vote of its common council, expressly *accepted* the company's acceptance, and printed all—the motion and both acceptances—in full in the City Record and minutes. Not another thing could have been or step taken, by the State of New York, by the City of New York, or by the Lines company, or by any other person, natural or artificial, to make and complete that grant, franchise and conveyance. All the sovereign power of the State, though divided, was, nevertheless, fully employed and exhausted in the effort by charter from the State and consent from the City, both in due form, to make a contract with, and convey a franchise to, this company. If, therefore, the grant, when so made and completed, was nothing more than a mere license, subject to the will of the city, then nothing more than such a license ever has been or can be granted by charter from the state to a corporation. Not only so, the common law rule and the innumerable concur-

ring decisions of the country from the beginning to the present hour—*that such a grant is a contract, and the right granted is property*—are all wrong. Idle as these statements may seem, such are the inevitable results of the decision under review.

But that decision cannot stand. It is impracticable and contrary to precedents, too long and uniformly established, to be now destroyed. It limits the power of the state, in such case, to the granting of anything but a license and which the city may revoke or render nugatory and useless at will. If any more enduring or substantial right is sought or to be had, it must be acquired, not from the state or city, but developed out of this license, before its repeal, if possible, by performance of a substantial part of the work contemplated by the license (201 N. Y. R., 420). Not in the part performance of a contract, for there is none, but under a license subject to repeal at any moment. Applied to this case, the company, under that decision, must have first done in addition to all it did do some substantial part of the work of making subways and laying wires in the streets, in order to acquire any real or permanent right to do so, or even any property right in its franchise. For, said the Court: "It is not pretended that the relator ever had a wire strung or operated over the streets of the city, * * *" (201 N. Y., 417). Applied to a railroad, the company must first acquire the right of way, grade it, and lay a substantial part of its rails, in order to acquire, and before it has, in fact, any permanent right to do so, or any property right in its franchise. And so as to other like enterprises. All the money and labor employed in the purchase of property and materials, the experimental work and initial manufacture of wires and insulating conduits, surveys, maps, diagrams, and other prepara-

tion for the ultimate purpose—as in this case, the laying and operating of electrical conductors—must be employed under a license, and the constant hazard of a total loss, by the scratch of a pen, without notice, or any hearing, in the repeal of that license. It is needless to say that such enterprises are not begun or carried on under such circumstances. No one would take the risk.

Authorities.

Neither can this decision stand under the settled rules of other decisions—any more than two or more impenetrable bodies can occupy the same space at the same time. One or the other, those rules or this decision, must fall. Such a permit is, *when granted,* one of two things—a revocable license, as held in this case, or an irrevocable contract and property, as held in the other cases. The Court of Appeals said the question "*is as to whether the consent ever amounted to more than a revocable license;*" and answered, "*a license merely revocable at the pleasure of the city, unless it has been accepted and some substantial part of the work performed contemplated by the permission sufficient to create a property right and thus form a consideration for the contract*" (201 N. Y., 420).

The Louisville Case.

Let us, at the risk of being tedious, repeat (because so applicable and conclusive of this whole case), the decision in the *Louisville* case, already cited, and a few others, keeping in mind the turning point here—whether such a consent or permit is a contract or property *when granted and accepted, or not until part performance.*

In that case, the Court, having stated that the City of Louisville could have imposed terms which

the company might have been unwilling or unable to accept, rendering the franchise revocable or nugatory, *held*: I. "But, *when the assent was given the condition precedent,* (that of obtaining the assent), *had been performed, the franchise was perfected and could not thereafter be abrogated by municipal action.* For, while the city was given the authority to consent, the statute did not confer upon it the power to withdraw that consent and no attempt was made to reserve such a right in the collateral contract contained in the provisions of the "consenting ordinance." If the "terms of this * * * contract had been broken, * * * the city would have had its cause of action. *But the municipality could not by an ordinance impair that contract nor revoke the rights conferred*" (224 U. S., 658-9).

2. "Those charter franchises *had become fully operative when the city's consent was given, and thereafter* the company occupied the streets and conducted its business, *not under a license from the city of Louisville, but by virtue of a grant from the State of Kentucky.* Such franchises granted by the legislature *could not,* of course, *be repealed, nullified or forfeited by any ordinance of a General Council*" (Id., 659).

3. "Such a street franchise has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right of way—but, howsoever designated, *it is property*" (Id., 661).

4. "* * * *To say that the right to maintain these appliances* (poles, wires, conduits, and fixtures) *was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the State's purpose to secure a telephone system for public use*" (Id. 663).

5. *"This grant was not at will, nor for years, nor for the life of the city. Neither was it made terminable upon the happening of any future event, but it was a necessary and integral part of the other franchises conferred upon the company, all of which were pereptual and none of which could be used without this essential right to use the streets* * * *" (Id., 664).

6. "Where the grant to a corporation of a franchise to construct and operate its road is not by its terms limited and revocable, *the grant is in fee*" (id.).

Once more we repeat that that decision is of itself and alone, entirely conclusive upon every point in the present case in favor of the relator. It might have been rendered in this case with the very same propriety, as in that one—so similar are the facts. The source, nature and character of the grant, the time of its taking effect and duration, and its freedom from repeal or impairment by the city, are all, and severally, considered and the long settled rules respecting them re-affirmed.

THE OWENSBORO CASE.

Subsequently there came before this Court a case which was argued in April, 1913, *Owensboro* vs. *Cumberland T. & T. Co.*, 230 U. S., 58, wherein the defendant corporation was possessed of a franchise from the common council of Owensboro very similar to the franchise possessed by the relator herein except that it provided that it could "be altered or amended as the necessities of the city may demand." It was granted in 1889. In January, 1909, the city counsel passed an ordinance requiring the company to remove its poles

and wires from the streets and the bill was filed for the purpose of annulling the ordinance on the ground that it was an impairment of the company's contractual rights in the streets and was in contravention of the constitution of the United States. The bill below was sustained, a permanent injunction issued and the decision of the Circuit Court was affirmed, Mr. Justice LURTON writing the opinion of this Court.

The case of *Louisville* against the same defendant, *supra,* was cited and the doctrine of that case re-stated. A dissenting opinion by Mr. Justice DAY is based solely upon the ground that there was a "statutory limitation of the authority of the city of Owensboro to grant a perpetual franchise." For that reason the learned Justice, dissenting from the prevailing opinion, held that the case was "not controlled by the previous cases in this court, such as the late case of *Louisville* vs. *Cumberland T. & T. Co.,* 224 U. S., 649, which had to do with the construction of a legislative grant to a corporation having perpetual succession, and did not involve the construction of the charter of a Kentucky city, such as is here under consideration."

Nothing need be, or can be, added to what is said in these two recent cases. Yet these decisions are such a complete embodiment of prior decisions upon the same subjects, that we cannot refrain from a brief reference to a few of them.

(a) In *Wright* vs. *Nagle,* (101 U. S., 791) the Court said: "The legislature of the State alone has authority to make such a grant (to build a bridge and take tolls). It may exercise its authority by direct legislation, or through agencies duly established, having power for that purpose.

The grant when made *binds the public and is directly or indirectly the act of the State. The easement is a legislative grant, whether made directly by the legislature itself, or by one of its properly constituted instrumentalities*" (id. 794).

(b) In *Detroit* vs. *Detroit, etc. Ry. Co.* (184 U. S. 368), the Court held: "The franchise to be a corporation came from the State, and all that the company required from the City was its consent to the laying down of the rails and the operation of the road through the streets of the City,* * *. This consent, *when given,* became a privilege or franchise granted to the corporation *and was property belonging to it*" (id. 394). Continuing, and referring to the decision in *People* vs. *O'Brien*, (111 N. Y., 1), approvingly, the Court said: "Where the grant (consent of a City to use of its streets) is not, by its terms, limited and revocable, *the grant is in fee, vesting the grantee with an interest in the street in perpetuity* to the extent necessary for a street railroad" (id. 395).

(c) In *Detroit, etc. Ry. Co.* vs. *City of Detroit*, (64 Fed. 628), cited approvingly in 184 U. S., *supra*, the Court said by Mr. Justice Lurton, that the consent of the City extending a term for the use of the streets, "was accepted in writing as required by law, *and became a binding and irrevocable agreement*, unless * * * void as being in excess of the corporate powers of * * * the parties" (id. 631). Continuing, and citing several New York authorities, the learned Justice *held: "When such consent is once given and accepted, it is irrevocable for the term fixed by the grant.* * * * Consent to such use of the streets constitutes a *typical easement and the right granted thereby is*

an interest in realty being an incorporeal hereditament" (id. 634).

(d) In *Africa* vs. *Board of Mayor, etc.*, (70 Fed., 729), the City attempted to revoke its consent to the use of streets, *not yet occupied by the company*, and the Court *held:* " * * * the plaintiff's franchise * * * *is not derived from the municipal corporation, but from the legislature itself*, and it is none the less so because obtained under a general corporation act, instead of a special statute. * * * The only authority delegated to the City in the completion of the franchise rights is the power to give its consent and prescribed terms. * * * *When it has given its consent and prescribed the conditions*, * * * *it has executed and exhausted its power*. * * * (id. 733). The easement thus acquired over the streets *becomes at once property and a property right and is taxable as such*. * * * The grant of this franchise, *when made by the State and accepted by the company, becomes a contract between the State and the company, giving it a legal estate in the franchise named in the charter, and, being a contract, is, under the Constitution of the United States, irrevocable and inviolable*" (id. 734), citing many authorities.

(e) *In Mayor, etc.* vs. *Africa* (77 Fed., 501), the Court *held:* "A right of way upon a public street, whether granted by an act of the legislature, or by ordinance of city counsel, or in any other valid mode, *is an easement, and as such is a property right capable of assignment, sale and mortgage, and entitled to all the constitutional protection afforded other property rights and contracts*" (id. 507).

posed by the terms of the grant (id). * * * it cannot be supposed that either the legislature or the framers of the constitution intended to offer for sale property, the title to which was defeasible at the option of the vendor. * * * Neither can it be supposed that they contemplated the resumption of property, which they had expressly authorized their grantee to mortgage and otherwise dispose of, to the destruction of interests created therein by their consent. We are, therefore of opinion that the 'company' took an estate in perpetuity in Broadway through its grant from the city. * * * *It is well settled by authority in this state that such a right constitutes property within the usual and common signification of that word*" (id., 40).

"It is, however, earnestly contended for the state that such a franchise is a mere license or privilege enjoyable during the life of the grantee only, and revocable at the will of the state. *We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country.* The laws of this state have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested them with the attributes of property generally" (id., 41).

(i) In *S. R. T. Co.* vs. *Mayor, etc., of N. Y. City* (128 N. Y., 510) the company obtained the necessary consent to the construction of its road over certain routes in the city, and over a strip of private lands acquired by the company. Before construction of the road on this strip, however, the

legislature authorized (?) its use for park purposes. The company sued to prevent this. The lower courts sustained a demurrer to the complaint, because this land had not been "*devoted to a railroad use actually in exercise.*" But in this, said the Court of Appeals, "they failed to recognize the acquisition and possession by the plaintiff of an indestructible franchise * * * (id., 516). When to it were subsequently added the consent of municipal authorities and of private owners, *was any feature wanting to the fullest franchise in such respects?* To say that the right to appropriate the land * * * *was not vested, but merely inchoate* * * * would be a great misapprehension of the effect and value of formal proceedings * * * under legislative authority * * * and of the formal consents of the public authorities to the projected line" (id., 519 520).

(j) In *People ex rel. N. Y. Edison Co.* vs. *Willcox* (207 N. Y., 86) Cullen, Ch. J., in a dissenting opinion as to other matters, and citing the decision in 128 N. Y., 510, *supra*, and other cases, said (page 111):

> "A franchise, though unexercised, is property within the constitutional safeguards. If taken compensation must be made. As already said, the franchise may be forfeited for non-user, but unless in the statute authorizing the acquisition of the franchise it is provided that a certain lapse of time shall operate as a forfeiture *ipso facto* a forfeiture can be decreed *only by judicial proceedings in a direct action by the state.* The franchise cannot be questioned by other parties," citing *Matter of Brooklyn El. R. R. Co.*, (125 N. Y., 434).

(k) In *People ex rel. Woodhaven Gas Co.* vs. *Deehan* (153 N. Y., 528) the Court said, of the consent to lay gas mains:

> "*Such a franchise is property that cannot be destroyed or taken away from it* (the company), *or rendered useless by any arbitrary act of the village authorities* * * *" (id., 532).

(l) In *Ghee* vs. *Northern Union Gas Co.* (158 N. Y., 510) the Court said, of a like consent of New York City:

> "It operates to create a franchise by which is vested in the corporation receiving it a *perpetual, indefeasible interest in the land constituting the streets of the municipality. It is true that the franchise comes from the state,* but the act of the local authorities, who represent the state by its permission and for that purpose, constitutes the act on which the law operates to create the franchise. The state might grant the franchise directly to the corporation without the consent of the local authorities, and has done so in many instances * * * (id., 513). *The legal effect of the consent, therefore, is the same as if the local authorities in form granted the franchise and the interest in the land.*"

And, citing the *Woodhaven Gas Co.* case, *supra*, the Court re-affirms the settled rule, "that such a franchise *is property that cannot be destroyed or taken away from it* (company) *or rendered useless by the arbitrary act of the local authorities*" (id., 513).

(m) In *Trustees, etc.*, vs. *Jessup* (162 N. Y., 122) the Court said:

> "A license is a personal, revocable and non-assignable privilege, given by writing or parol to one without interest in the lands of another, to do one or more acts of a temporary nature upon such lands. * * * Although originally revocable at the will of the licensor, it may become irrevocable through the expenditure of money by the licensee * * *."

An easement is a permanent right conferred by grant or prescription, authorizing one land owner to do or maintain something on the adjoining land of another, which, although a benefit to the land of the former and a burden upon the land of the latter, is not inconsistent with general ownership. * * *

A franchise is a grant by or under the authority of government, conferring a special and usually a permanent right to do an act, or a series of acts, of public concern, and, when accepted, it becomes a contract and is irrevocable, unless the right to revoke is expressly reserved (Id., 126).

The permit in that case, to build a bridge and make a road to it, was held: "* * * *not a license, because it is neither temporary nor personal* * * *." "It would fall under the definition of an easement," said the Court, "if it had been granted by an ordinary land owner and not by a body (a town) holding lands under water in trust for the public. *We think it is a franchise*, because it was granted in the exercise of a governmental power conferred by royal charter in colonial days. * * * It was a special privilege, because it is not by common right; *it is permanent, because*

there is no limitation as to time, and is of public concern, because it relates to the public domain. * * * The resolution has the same effect as if a like privilege had been granted by act of the legislature in relation to similar lands held by the state for public use. *A grant by the resolution of a legislative body is as effective as a grant by deed of an executive body and is the usual form in which franchises are conferred*" (Id., 127).

(n) In *City of Rochester* vs. *Rochester Ry. Co.* (182, N. Y., 99), Mr. Chief Justice CULLEN, speaking of the difference between a city grant of exemption from taxation and other city franchises, said:

> "That privilege (exemption) is not at all similar to such a franchise as * * * to lay gas mains, * * *. *The grant of such a franchise, even without consideration, is, unless a right to revoke is reserved, as effectual to vest an indefeasible title in the grantee as a voluntary conveyance of a piece of land. Not so, however, as to an exemption from taxation or from the exercise of the police power. It is property only when granted on a consideration and if granted without consideration may be recalled*" (Id., 118-119).

(o) In *City of N. Y.* vs. *Bryan* (196 N. Y., 158), the same learned Chief Justice said of a city's consent to use its streets:

> "It is not necessary that it be granted to a corporation, * * * *and when granted it becomes property. It cannot be arbitrarily recalled unless a reservation of that power is contained in the grant*" (Id., 164).
>
> "* * * *Not only the franchise to be a corporation, but the franchises granted to a cor-*

poration when formed spring from the state * * *. The authority to make use of the streets of a city for railroad purposes *resides in the state and is a part of the sovereign power, and the right*" of so using the streets, "which for the convenience we call a franchise, *must always come from that source*, whatever may be the agencies through which it is conferred. * * * *Therefore the consent of the city was but a step in the grant of a single indivisible franchise to construct and operate a street railroad*" (Id., 165-6).

COMMENT.

But why multiply authorities?

If those, already cited, do not show that the grant in question is a contract, not a license, and that the right granted is property; that title thereto vested at the moment the grant was made and accepted, and that the grant could not be thereafter revoked, nor the contract impaired, nor the property taken or destroyed by any arbitrary act of the state or city, then no greater number of authorities would do so; besides, some of the commonest and plainest words of our language must have lost their meaning or never had any.

The simplest form of this dispute which is attempted to be raised, is a question as to the *time* of an event—whether title vested at the time of the grant and its acceptance—the time when "the minds met," or not until part performance by the grantee. Both, the grant and performance, could not happen at the same time. It is manifest that part performance might have been, as often is, made a condition precedent to the vesting of title. It may be admitted that the grant was not complete until the title of franchise vested for that was the sole purpose of the grant. Every rule or means

by which such a question is determined shows that the title vested in the case at bar *at the time of the grant and its acceptance.*

THE GRANT ITSELF. The charter of the company directly from the state, Oct. 14, 1882, was upon its face, by the language used in it, a then present grant. Not only of the franchise to be a corporation, but of an absolute freehold interest in the soil of the streets, with the right to immediate possession and use of the property granted. Upon the sole condition, however (contained in a previous statute), that the company should first obtain the assent of the city to the use. That condition designated the event, and fixed the time, the very moment, at which the company's title with right of possession and use was to become complete. The resolution was not the grant,—it was a condition precedent to the grant by the state taking effect.

The resolution of the city, April 10, 1883, was that, "*permission be and hereby is grated to the*" company (by its full name) "to lay its wires," etc., in and through the streets, etc. There immediately resulted a then present, unconditional, absolute grant of the right to the immediate use of the streets.

However, a previous ordinance, (1878), contained a provision, that *grantees* (not *licensees*) thereunder should, within six months after the grant, file certain maps, diagrams and statements, indicating the amount and location of the spaces to be used. Conceding this to be a further condition precedent—about which we raise no question—it also designated the event, the act, and the very moment, by and at which the company's right to use the streets was to become complete. These maps, etc., were filed within a month and nine days

(May 18, 1883), after the permission was granted. The grant contained other provisions, as that the company should pay for replacing pavements within ten days after taking them up, and donate police and fire wires, when laid, to the city. But being subsequent to the grant, nothing more need be said of these. By accepting the grant the company agreed to perform these obligations as they accrued.

INTENTION.—Neither is there the least room for any question as to the intention of the parties in respect to the time of taking effect or the nature of the grant. First of all, their intention is expressed in their own language on the very face of the papers themselves—"*is hereby granted.*" Moreover, and in the words of the Court, quoted above: "*It cannot be supposed that either the*" state or city "*intended to*" grant "*property the title to which was defeasible at the option of the grantor, * * * Neither can it be supposed that they* (state or city) *contemplated the resumption of property, which they had expressly authorized their grantee to mortgage and otherwise dispose of,* (lease in the present case) *to the destruction of interests created therein by their consent*" (111 N. Y., 40). If the concurrence of an express declaration of intention with a presumption of the same intention does not establish it, how, then, can it be established?

BESIDES THE AUTHORITIES—"*When the assent was given* (April 10, 1883) the condition precedent *had been performed*, the franchise *was perfected* and could not *thereafter* be abrogated by municipal action." "*Those franchises had become fully*

operative when the city's consent was given, and *thereafter* the company * * * conducted its business, not under a license from the city * * *, but by virtue of a grant from the state. Such franchises granted by the legislature could not, of course, be repealed, nullified or forfeited by any ordinance of a" city council. *"To say that the right * * * was not vested,* (because the land had not yet been devoted to the intended use), *but merely inchoate, * * * would be a great misapprehension of the effect and value of the formal proceedings * * * under legislative authority, * * * and of the formal consents of the public authorities."* The consent "amounted to an *immediate* grant of a * * * freehold interest in the soil." "When it (the city) has given its consent, and prescribed the conditions, * * * it has executed and exhausted its power. * * * The easement thus acquired over the streets becomes *at once property and a property right."*

There is no answer to either of the foregoing matters. The grants, speaking for themselves, specify and declare the event, the act, and the moment, at which the grants were to become and did become complete, vesting the absolute title, with the right of immediate possession and use in the company. It is not even to be supposed, said the Court, that the parties intended otherwise than as stated in the grants; or that the one was granting and the other accepting a defeasible title. Added to these are the oft repeated and equally conclusive decisions that *when* the consent is given, *immediately, at once;* the franchise *had become* completed, the property right *is vested,* and cannot *therefore* be arbitrarily revoked or destroyed. The inevitable result is a conclusion in favor of the plaintiff in error. If not, no law or rule of con-

duct can be established or maintained, and it would only be a waste of time and labor to write and publish the facts and reasons for any decision.

II.

While performance of some substantial part of the work (contemplated by the permission sufficient to create a property right and form a consideration for the contract), was not necessary to create a right of property nor a consideration for the contract, nevertheless, there was such performance, and there would have been full performance, but for the acts of the state and city.

CREATION OF PROPERTY RIGHT.—The property right in question, in the very words of the Court (196 N. Y., 165), "*resides in the state, and is a part of the sovereign power, and the right * * * which for convenience is called a franchise, must always come from that source.*"

Why, then, is it necessary, or even possible, for the company to perform work in order to *create* that right?

CONSIDERATION.—The state and city themselves, not wards of the Courts, but fully competent, and in the exercise of sovereign power, expressly fixed and specified a different consideration, and the only consideration, which they wanted or required for that right, and the company promptly paid it. Let us repeat again, briefly. The state, possessed of the property, with full power to convey it, absolutely, with the right of immediate possession

and use, without permission of the city, or any consideration, if it saw fit, delegated, nevertheless, a part of that power to the city—authority to assent to the use. Having done this, the state in the exercise of its reserved power, made an absolute grant of the property to the company, with the right of immediate possession and use, upon the sole consideration, that the company should obtain that assent from the city. The company promptly, duly paid, in full, the very consideration required. Thus the transaction directly with the state was entirely finished, ended and completed.

The grant from the city, like the other, was absolute, vesting in the company a right to the immediate use of its property, upon the sole consideration, before using it, that the company should, within six months after the grant, file maps, etc. In other words, that it should (for manifest reasons) locate and designate its property, and be confined to these boundaries (par. III, supra). There were other subsequent considerations as payment per lineal foot and for replacing pavements, after removing them, and donating police and fire wires, after laying them. Things which the company has been trying to do, but prevented by the state and city from doing, ever since a short time after its incorporation. "*But the question now presented is not one of forfeiture*," said the Court, (201 N. Y. R., 420). Hence, subsequent conditions are not important here. The company accepted the grant, expressly obligating itself in the performance of all its conditions and requirements. The city, having accepted that acceptance, the company promptly filed the requisite maps, etc., at an expense or outlay of $300, and that grant was, also, fully com-

pleted. That the obtaining of the permit from the city, and the filing of these maps and papers were, respectively, both *good* and *valuable* considerations for the grants or contracts, are too plain for discussion. Besides, "*The grant of such a franchise, even without consideration,*" said the Court of Appeals (182 N. Y., 99, 119), "*is, unless the right to revoke is reserved, as effectual to vest an indefeasible title in the grantee as a voluntary conveyance of a piece of land.*"

These facts and law fully meet and refute the claim that performance of some substantial part of the work was necessary to create a property right and form a consideration for the contract.

The learned justice, writing that opinion, quoted a part of a sentence from each of two decisions, here mentioned.

In *Capital City, etc., Co.* vs. *Tallahassee* (186 U. S., 401), the city consented to the use of its streets by a corporation for a gas plant and an electric plant. The former was put in operation, and nothing more need be said of it. Twelve years elapsed with no attempt to construct the electric light plant. In the meantime the legislature authorized the city to construct and operate its own electric light plant. The company sued to prevent this, claiming the exclusive right to use the streets for such purposes, and impairment of its contract.

Held: "* * * *Under the express language of this statute* * * * the privileges were to attach for twenty years *from the time the corporation commenced* to carry out in good faith the terms of its articles of incorporation. *The condition under which the exclusive privilege* * * * *attached has never been performed*" (id., 410).

"In the next place, even if the exclusive privilege of this nature, *tending to establish a monopoly,* was granted without such express condition precedent as we find in our statute,"—the remainder of the sentence is quoted by the learned Justice of the Court of Appeals—"*such a grant does not become a contract or a vested right so as to be protected by the constitution of the United States, until the company has, to say the least, begun to do the thing required by the charter as a consideration for the grant of such privilege*" (id., 410-411. R., 419). Of course not. But what application has that decision to this case? There, no attempt was made to perform an express statutory condition precedent to the vesting of the right. Here, the condition was promptly and fully performed, in letter and spirit. There, an exclusive privilege was claimed, tending, therefore, to establish a monopoly. Here, there is no such claim or tendency. On the contrary, the tendency of this claim and franchise is to break up an existing monopoly and to prevent monopoly in the future.

In the other case, *Pearsall* vs. *Great Northern Ry. Co.* (161 U. S., 646), the defendant company, incorporated under another name at an early day, (1856), was authorized to consolidate with other railroad companies. The legislature, by acts of 1874 and 1881, prohibited the consolidation of parallel or competing lines. After these acts, and some forty years after the incorporation of the company, it entered into a consolidation agreement with the Northern Pacific Ry. Co., having parallel and competing lines. A stockholder of the Great Northern Company sued to prevent the consolidation. The Court having defined *vested, protective* and *contingent* rights, etc., *held*: "But where the

charter authorizes the company in sweeping terms to do certain things which are unnecessary to the main object of the grant, *and not directly and immediately within the contemplation of the parties thereto,* the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked *if a possible exercise of such power is found to conflict with the interests of the public*" (id., 673-4). And, after showing, in effect, that it was not to be supposed that the situation and attempt, at the time of the consolidation, "*to stifle legitimate competition*" were "*thought of at the time*" of the incorporation, the Court held that the unexecuted right of such a consolidation was still within the power of the legislature and might be revoked by it (it will be noticed that the revocation was by the legislature itself, not by its agent), a far stronger case than the case at bar.

In considering the scope of the clause of the constitution protecting the obligation of contracts from impairment, vested rights, and the like, the learned justice, writing that opinion, used the language quoted by the Court of Appeals in this case, to wit: "*The contract protected by this clause must be founded upon a good consideration. If it be a mere pact, a bare promise to allow a certain thing to be done, it will be construed as a license.*" Continuing, he cites an authority, that where the legislature had exempted certain church association property from taxation, and thereafter enacted that such of the property as was not in the actual use and occupation of the association should be subject to taxation. "*It was there held,*" said the learned justice, "*that the original concession of the legislature exempting the property from taxation was spontaneous, and no service or*

duty or other remunerative consideration was imposed upon the corporation, and hence that it was in the nature of a privilege or license, which might be revoked at the pleasure of the sovereign" (id., 667). But that decision has no application to this case where the contract was founded upon a good and valuable consideration fully paid. Here it was not a mere nude pact, a bare promise, to allow a certain thing to be done; nor a spontaneous exemption from anything; nor was it attempted to be revoked by the sovereign; nor was there involved any attempt to stifle competition. But it was an intentional solemn grant of a property right, an immediate interest in the soil, and irrevocable. Neither of those decisions was mentioned or cited in the recent Kentucky case (224 U. S., supra), exactly like the one at bar; for the reason, of course, that they have no application to such a case.

PERFORMANCE.—Nevertheless, the plaintiff-in-error did perform a substantial part of the work contemplated by the city franchise, and doubtless would have performed all, but for the acts of the state and city. A brief statement of the work done is made here, not because it is deemed essential to this proceeding, but because it is a fact, and supposed non-performance was made a ground for denying the relief asked for (see also pp. 7 *et seq.*, *supra*).

The precise work contemplated by the franchise was "*to lay wires or other conductors of electricity in and through the streets, avenues and highways*" of the city, "*and to make connections of such wires or conductors underground*," by certain specified means (fol. 173). The first essential, therefore, and certainly a substantial part of the work, was the manufacturing or procuring of suitable wires

or conductors, and especially the developing of the art of protecting and insulating them underground. This was the first step to be taken, and without which none other need be taken. That art was, at the time of the franchise, in its infancy and not understood. Electrical insulation of wires, as well as their protection from moisture and other elements, was in an experimental state (fols. 16, 288), almost unknown (fol. 500). These difficulties considered, then, by other experts, practically insurmountable, had not advanced beyond a mere matter of belief in the mind of the late Sidney F. Shelbourne, admittedly a pioneer in the art and one of the incorporators and first president of the relator (fols. 263, 289).

The company having obtained its street franchise April 10, 1883, laid out a comprehensive system for conduits, procured the making and filing May 18, 1883 (fols. 18, 294, 305), of the maps, diagrams and tabulated statements (fols. 48, 190-209), required by the franchise (fol. 189), at a cost of $300 (fol. 265), began at once the prosecution of its business in several directions, among them, of course, the securing of inventions, and patents thereon, to overcome those difficulties (fols. 47, 290). Some 17 such patents were obtained, one of them at the end of litigation (fol. 53), and duly assigned to the company (fols. 275, etc.).

Having opened an office first on Gold Street, and afterwards, on May 1, 1883, in the Queen Building, on Wall Street, where it was maintained for three years, at a rental of $1,500 a year (fol. 256), and a shop or factory on Greenwich Street (fol. 257), all in New York City, the company began at once the business of manufacturing and testing of insulated wires, conduits and other devices and appliances, including carriers to draw the cables

through the conduits, insulating material and methods of producing and making it. All of this work and industry, at first not wholly successful, was brought to such a point as to be practicable in 1885 or 1886 (fols. 48-9, 292-3, 308-9).

Although it may be difficult, it is necessary, in considering the early activities of the company, to remember and realize how immature was the art of insulation of electric currents at the time this company accepted both a charter and a franchise which was limited to the operation of delicate telegraphic currents *underground* (fols. 142, 172-173).

It was a daring project. Every one was skeptical, however simple it may seem to-day, when we have an underground conduit from Boston to Washington, and thousands of miles of such conduits in the City of New York alone. At that time the practical operation of such wires was deemed an impossibility and it is notorious that prominent experts testified under oath that underground telegraph wires in New York City could not be properly insulated, although the mandate of the State Legislature directed that it should be done. In brief, the testimony as to the activities of the company, as to the experiments they made, the insulating material they bought, the conduits which they constructed in their factory, and all the other necessary preliminary operations of the company must be viewed in the light of "the state of the art." If that is done then it still more clearly appears that such preliminary experimental work and expenditures were contemplated as necessary by both parties to the grant at the time it was made and accepted; and the conclusion that they were made in reliance upon the grant becomes irresistible.

During the first year of the company's existence, and during every year thereafter until his death

by accident in 1887, the president of this company, himself a lawyer and an inventor (fols. 257-8, 299), was actively engaged in the company's office and factory in constant experiments with insulating materials, and construction work (fols. 255-8). More recently the company employed a force of engineers who planned a comprehensive system of wires to be installed in the conduits of the defendant in error, and upwards of *one hundred thousand contracts* have been entered into with residents of New York City, desirous of securing such telephonic facilities, besides contracts with independent companies outside of the city (fols. 50, 82-3, 308). In short, the company began immediately after its incorporation, as already stated, and has ever since been actively engaged in the prosecution of its business (fol. 286).

MONEYS EXPENDED.—During the first year of the company's existence, it spent, in the experimental and constructive part of its business, approximately $50,000 (fols. 261-2), the destruction of its books making it impracticable to state the exact amount (fols. 51, 261-2). Over $30,000 of that sum was advanced by one of the stockholders, $12,000 by another (fols. 262-3), and $15,000 by still another (fol. 287). Upwards of $75,000 was expended prior to the year 1900, and $400,000 since that time (fols. 51-2, 87-9). A portion of these moneys was expended directly by the company itself and a portion by the stockholders for its benefit, and in the prosecution of its business, including the securing of inventions and patent rights thereon, the experimental and construction work aforesaid, office rentals, employment of executive and engineering force, the securing of contracts with persons desiring telephonic service, payment of taxes, legal services and miscellaneous matters (fols.

88-9). The company has paid its state, county and city taxes from the time of its incorporation to the present, including a $9000 increase on its special or franchise tax for the year 1902 (fols. 51, 84-7, 272).

To pause for a moment. Doubtless the persons who performed all this labor, and who advanced these moneys, thought, at least, that they were performing a substantial part of the work contemplated by their franchise. They were in fact doing so. The only strange thing about the matter is that any one should think otherwise. No wonder the Court of Appeals held: "But the question now presented is not one of forfeiture" (p. 420 of the record).

LEGISLATION AND LITIGATION.—On June 13, 1885, and just about the time the company had made it practicable to lay such wires and conductors under ground, and was ready to begin that part of its business, the legislature passed chapter 499 of the laws of that year (par. VIII [b], *supra*), requiring any company operating or intending to operate such conductors, to file a map with and obtain its approval by another board, and authorizing that board to devise a general plan of subways, and to compel all such companies to use the same. Then followed the contracts, acts of the legislature (par. VIII, *supra*), and series of litigations (par. XII, *supra*), beginning in Sept., 1886, and which, with occasional intermissions, is still going on, because of relator's persistent efforts to do the things and enjoy the benefits permitted by its franchise. With the result that the only remnant of the franchise left to the relator is the right, vouchsafed to it by this Court (145 U. S., 190), of laying its lines in those subways. Even this right is taken away by the state courts in this proceeding, render-

ing the street franchise, as well as the charter itself, utterly nugatory and worthless. Not, as they hold, because of forfeiture. Nor because the relator has not fully paid the consideration required by the state and city. Nor because relator has not employed every available means, before the city and courts, for leave to make subways and lay its lines, as permitted by its franchise. But because, as they say, the franchise never was anything more than a revocable license; and that, despite all the state and city has done to prevent it, the relator should have performed some substantial part of the work in the streets, sufficient to create a property right and form a consideration for the contract; and that all the work done and moneys expended by the relator was not sufficient to create that right or form the consideration.

(Note: The italics herein are mainly ours, and used for emphasis.)

We respectfully submit that such is not the law, and that the decision below should be reversed.

N. Y., March, 1914.

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IN THE

Supreme Court of the United States

October Term, 1912—No. 829.

October Term, 1913—No. 370.

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Plaintiff-in-Error,

vs.

EMPIRE CITY SUBWAY COMPANY,
Respondent-Defendant-in-Error.

In Error to the Supreme Court of the State of New York.

REPLY BRIEF FOR THE RELATOR-PLAINTIFF-IN-ERROR.

Preliminary and in the Nature of an Index.

We shall not attempt to do more, in replying to the contentions of respondent, than to answer the points and attempted issues contained in its brief.

We shall ignore such contentions, in the answering affidavits, as the zealous and learned counsel for the respondent advance, e. g., the contention that no tender of $5,000 was made because an affiant (the counsel and an officer of the respondent) swears, without disclosing the source of his information, that the money tendered did not belong to the relator!

Eliminating such contentions, because abandoned here, we shall endeavor to show that each contention of respondent's brief is either irrelevant, or easily answered, or both.

The "STATEMENT OF FACTS" (pages 2 to 56) is so full of irrelevant assertions and of misstatements, including errors in stating what has been decided by the courts, that we have endeavored to give a careful and judicial REVIEW OF THE OPINIONS AND DECISIONS (page 4, *infra*), showing the whole legal History of the relator and its franchise and with the same object in view, we have supplemented it with an "OUTLINE OF THE FACTS" (page 45, *infra*).

Respondent's first point attacks the JURISDICTION OF THIS COURT and is fully answered under POINT A *infra*. It could have been made two years ago and so seems to have been thought to be of little value or is presented as an afterthought.

But the real answer to the respondent's brief is simple, for it is to be noted that there is no serious attempt in it to meet the issue of law raised by our main brief, or to distinguish this case from the two there discussed, except in one particular hereinafter discussed under POINT B *infra* (in answer to Respondent's Point III), to-wit: that the relator never (it is claimed) "acted upon" its franchise

and therefore (it is contended) never had a contract.

Not content with that claim the relator advances the following irrelevant contentions.

Under POINT II, it is asserted that the relator proposes to promote a telephone business instead of a conduit business (page 19); this is answered *infra* under POINT C.

It is also asserted under POINT II that a telephone business is beyond the scope of the relator's franchise. Answered *infra* under POINT D.

Under POINT IV it is asserted that a map filed was not a *bona fide* map (page 50;—answered *infra* under POINT E).

Under POINT V it is contended that possibly the following matters (not referred to in the opinion or record as having been considered by the court below) may have decided the case, to-wit:

(1) That there was non-compliance with chapter 263 of the laws of 1892. Answered under POINT F *infra*.

(2) The relator is not the real party in interest. Answered under POINT G *infra*.

(3) The application was not made in good faith. See POINT H *infra*.

(4) The relator has lost its rights by *laches*. See POINT J *infra*.

(5) The relator has lost its rights by some unmentioned statute of limitations. See POINT K *infra*.

Although in its points the respondent seems to have abandoned a contention made incidentally in its statement of facts, it may be proper to reply to it, and hence we have considered, under POINT L *infra*, the contention found on pages 8, 9 and 10, of respondent's brief that the relator has assigned its franchise and thereby has lost all rights under it.

Under POINT M *infra* we answer what is said *re* relator's taxes on page 13 of respondent's brief.

Review of the Opinions and Decisions heretofore rendered by the courts of New York and by this court in proceedings in which this relator was a party and therewith a Chronological Statement of each Legal Step taken by the Relator from 1883 to date, the reasons therefor, and the result thereof.

It seems necessary in view of the remarkable construction placed by the respondent's counsel upon the various opinions in the previous litigations, which are referred to under XII on page 14 of our brief already filed, to briefly state how it has come about that so many years have been lost in litigation and the fundamental proposition now before the Court has never been squarely *decided*, until this fourth proceeding brought by the relator, although several *opinions* have been rendered upholding the irrevocability of the relator's

franchise. This recital will show incidentally how the question of laches is not in the case. It will also demonstrate the irrelevancy of much contained in the respondent's brief.

The Subway Acts.

At the outset, be it remembered that the relator was organized in the latter part of 1882 at a time when the art of underground construction was immature, as we have stated in more detail in our main brief on pages 52 and 53. At that time the multitudinous overhead wires for electrical purposes of all kinds so encumbered the streets of New York City that the subject of underground installation became a matter of great public interest, and this resulted within three years of the relator's incorporation in the passage by the New York Legislature of various acts (referred to as the Subway Acts).

The initial section of the initial act reads as follows:

"All telegraphic, telephonic and electrical light "wires, and cables used in any incorporated City "of this State, or City of five hundred thousand or "more, shall hereafter be placed under the surface "of the streets, lanes, avenues, etc., of said City."

The last section of the same act provides that:

"No City in this State shall grant any exclusive "privilege or franchise under this Act to any cor- "poration or individual by which a monopoly may "be created on any terms" (Ch. 534, Laws of 1884).

In the three next succeeding years Subway Acts were passed creating a Board of Commissioners of Electrical Subways who were "charged with the

"responsibility of enforcing the provisions of the "Act of 1884." (The name was changed by the Act of 1887 to the "Board of Electrical Control.")

The Subway Contracts.

During these years and by reason of these acts, contracts were made and modified between the city and the Consolidated Telegraph and Electrical Subway Company (the predecessor of the respondent) by which certain privileges were conferred upon the respondent's predecessor; and the contract of May 15th, 1891, between the city and the respondent is a continuation and modification of these contracts (fols. 91, *et seq.*).

The Right to Construct Subways.

Let it be noted that the extent of the privileges conferred by these contracts has been adjudicated by the New York courts to be far greater than the then counsel of the relator supposed. Counsel must have read, what was in all the contracts, and in all the statutes approving the contracts, a similar provision to that which we have already quoted from the Act of 1884, to wit: that nothing in the statutes and nothing in the contracts was to be deemed to grant any monopoly to the respondent or its predecessors (fol. 131). It would seem that they should be justified, or at least excused, for taking that position, since it was the adjudicated law of the State (see opinion of Van Hoesen, J., *quoted infra*). Surely if laymen and lawyers are to be presumed to know the law, so may judges.

The relator has no quarrel, on this appeal, with those decisions in the state courts, and in

this court, which overruled its contention in reference to its right *to construct* conduits in the streets of the city and to dig up its surface for that purpose; but this portion of this resume of former decisions is useful in showing two facts—first, that the long delay caused by litigation was entirely excusable, and, secondly, that this right to construct conduits with its direful inconvenience is not involved in this proceeding, as even HAIGHT, J., admits (see his opinion, page 416 of the record).

The danger of that inconvenience to the city had passed before this proceeding began by the decision in the *Ellison* case.

THE HESS CASE.

In a case argued before Mr. Justice VAN HOESEN, as early as 1886 (*Hess* vs. *N. Y. Underground Telegraph Co.*, N. Y. Register, Jan. 25, 1887) he wrote as follows:

> "The commissioners have undertaken to "give to the Consolidated Telegraph and Elec- "trical Construction Company the *exclusive* "privilege of building conduits for electrical "conductors in the streets of New York, and "to prevent any other company from placing "electrical conductors underground unless it "will agree to place its conductors in the "conduits of the Consolidated Company, and "pay rent to that company. This is obviously "an attempt to create a monopoly." (Italics are ours).

He also held that the proper local authority to whom application was to be made by a company

desiring to lay wires in the streets was not the Commissioners of Electrical Subways, and held that " 'The local authorities,' not the commission-"ers, are designated as those 'having control of the "'streets.'" This clearly indicated the Commissioner of Public Works.

THE INJUNCTION SUIT AND THE SQUIRE MANDAMUS PROCEEDING.

When it was provided in these contracts and statutes that the former should not be construed as granting to the respondent Subway Company "any "exclusive privileges, immunity or franchise what-"soever," counsel for the relator believed that meant that other companies (itself included) might be granted (especially if they had already received a franchise giving them the privilege) the right to put other conduits under the streets of the city, for legitimate uses.

It was in accordance with this construction of the Subway Acts that the relator in good faith acted, advised by able counsel (Messrs. Jesse Larrabee, David Leventritt and Roger Foster *inter alios*) and after the Commissioner of Public Works denied an application to open the streets, they at once applied for a writ of mandamus, to compel that official "to grant a permit to make ex-"cavations in the streets of the city so as to con-"struct its lines of subterranean electrical wires" (*People ex rel. N. Y. Electric Lines Co. vs. Squire*, 14 Daly, 184).

It is important in passing to note that, what the relator desired, from the beginning was the laying "of lines of subterranean electrical wires." The building of subways, if contemplated at all, was, incidental, even at that time, the respondent's counsel to the contrary notwithstanding.

The error committed by the then counsel of the Lines Company, which was litigated in that case, and the only point upon which the case finally turned in this court, was that *the application should have been made for the permit, not to the Commissioner of Public Works, but to the Board of Commissioners of Electrical Subways.*

That proceeding, referred to as the *Squire* case, was begun very promptly by the relator in October, 1886; was argued in the Court of Appeals in 1887 (107 N. Y., 593), and in this court in May, 1892 (145 U. S., 175). There was no intimation in any of the opinions, in that case, that the counsel for the company had been wrong in assuming that there was no exclusive privilege granted to the respondent's predecessor. The second paragraph which we have quoted from Mr. Justice VAN HOESEN's opinion was wholly overruled--the first quoted paragraph was not passed upon, to wit: that the New York Electric Lines Company, with its existing franchise was not entitled to build its conduits as well as to lay its wires in the streets of the city. That it was entitled to do both if application was made to the proper authority was clearly intimated.

We are well aware that the contrary to this statement of what was before this court on the former appeal is asserted in the respondent's brief, but the opinion of LAMAR, J., sustains our statement.

THE ACT OF 1892 and "EXISTING DEMANDS."

This act is not referred to in our main brief; but it assumes some importance in view of some contentions in the respondent's brief, and reference to it is necessary, in continuing our recitation of the legal and legislative steps taken. Almost simul-

taneously with the rendition of the opinion in this court, a bill (probably instigated by a fear that the relator might, upon the decision of that case, at once attempt to make application to the proper city authority for permission to place its electrical conductors in the streets) was introduced into the legislature, presumably by those whose interests it served. It provided that no permit should be granted by said board (the Board of Electrical Control) unless, if, the application "be for underground "construction, there is an existing demand for such "conduits or subways; nor unless the occupation of "said conduits or subways is reasonably assured, "and the public interests require the construction "thereof" (Ch., 263, Laws of 1892).

THE PATENT SITUATION (1892-1905).

The record shows (fols. 315 to 317) that in 1892 there was no "existing demand," and that the "public interests" did not require the placing of either conduits or wires in the streets of the city because at that time the multiple switchboard patents held by the Bell Company had not expired and did not expire until about the year 1904. It might have been possible to operate under other patents in smaller cities, and in them such operation was then going on by independent telephone companies (fols. 599-612). But to supply a large city like New York with proper and efficient service, a switchboard of the largest capacity was necessary, and that was only obtainable under the aforesaid patents.

The claim is made in the answering affidavits that the relator could have operated in defiance of these patents because others were doing so under guarantees against loss furnished by the independent manufacturers of such switchboards during the years down to 1905; and that there-

fore the relator should have acted and asked for permission to enter the subways or to construct (fols. 607-613). The suggestion answers itself and if it does not, there was never at any time any obligation on the part of the company to begin operations even if there was a public demand.

The Ellison Case.

The relator, as alert as ever, immediately thereafter retained some of the present counsel of the relator and application was promptly made (December 8th, 1905) to the Commissioner of Water Supply, Gas and Electricty, the successor of the Board of Electrical Control, which by this court, had been found to be the proper municipal authority to whom to apply when it was proposed to construct conduits.

Upon his refusal, application was made for a writ of mandamus in a proceeding which we shall refer to as the *Ellison* case, the third in numerical order of the proceedings brought by the relator.

Intermediate the application to the city official to open the streets and the beginning of the *Ellison* case, the Board of Estimate and Apportionment on May 11th, 1906, without notice to, or the knowledge of the relator, passed a resolution (see page 8a of Respondent's brief), purporting to revoke *all of the rights* of the relator acquired under the resolution of April, 1883. This was done at the instigation of the city's counsel, in the *Ellison* case. It was accomplished just in time to recite it in the answering affidavits of the city in that proceeding.

In passing it should be noted that the resolution was so little thought of and seemed so obviously futile, that none of the opinions in the *Ellison*

case refer to it except that of Justice BISCHOFF at Special Term, and he clearly affirms that the franchise of the relator is irrevocable. This statement is subject to our discussion of his opinion *infra*.

Up to this time, no court, either in opinion or decision, had held that the relator was not possessed of a contract, or that the contract was revocable. Nor had any court held that the relator had no right to construct conduits as well as the right to lay wires in the streets, *provided it applied to the proper municipal authority.*

PREVIOUS OPINIONS RE THE IRREVOCABILITY OF RELATOR'S FRANCHISE.

In so far as the courts had, in their opinions, passed upon the contract rights of the relator, and their irrevocability under the Federal Constitutions, they had sustained them.

The first proceeding brought by the relator was decided by Judge O'GORMAN in August, 1887, and his opinion is reported in the New York Daily Register of August 10, 1887. It is not in the list in respondent's brief (p. ix). The decision was rendered upon demurrer to the complaint in an action brought by the relator against the Consolidated Telegraph and Electrical Subway Company. The complaint alleged that the relator, in conjunction with others, was occupying the streets to the exclusion of the plaintiff, in violation of the franchise rights of the plaintiff, the relator here. In the course of his opinion sustaining the demurrer on the ground that the plaintiff had no exclusive rights in the streets, Judge O'GORMAN says:

> "The agreement between the City of New "York and the plaintiff corporation was, in "my opinion, *a contract valid and binding on "the contracting parties.*

"Before its execution, the City had received "from the State of New York implied author- "ity to enter into such a contract and to grant "permission to plaintiff to occupy certain "parts of the public streets for the purposes "set forth in the agreement. Laws of 1879, "Chap. 397."

This action for an injunction was apparently terminated by the decision on the demurrer and the proceeding in the Superior Court of New York referred to as the *Squire* case, was continued (there was no need of proceeding in both) and Judge ALLEN's decision was affirmed on his opinion (14 Daly, 154). Therein he shows that the relator brought four counts in an indictment alleging the unconstitutionality of the Subway Act of 1885, to wit: (1) that it impaired the obligation of the relator's contract; (2) that it was a local bill embracing more than one subject; (3) that it enacts that an existing law shall be applicable which it does not quote, and finally, (4) that it compelled the operating companies to pay the expenses of the Subway Commissioners and the cost of constructing the subways which the Commission might build, and it also claimed that the act did not apply to the relator because it was the purpose of the relator "to lease its wires and not to operate them."

Concerning this last objection, it is to be noted that it wholly abandoned it in the Court of Appeals, as appeared by Chief Judge RUGER's opinion (107 N. Y., 593).

The writ was denied, as we have before noted, on the ground that the relator had not complied

with the act because it had not asked for the necessary permission to open the streets from the proper authority, to wit, the Commissioners of Electrical Subways, but from the Commissioner of Public Works. In the course of his opinion, however, ALLEN, J., says:

> "The relator next claims that the Act of "1885 is violative of the Constitution, as im- "pairing the obligation of contracts and tak- "ing away property without due process of "law. It contends that the grant to it by the "Common Council, having been accepted by it, "became vested with the qualities of a con- "tract. This is true."

The authoritativeness and weight of this opinion is acknowledged by the Court of Appeals, in Judge HAIGHT's opinion, for he quotes the following sentence from it:

> "Until such grant has been accepted and "acted upon it is a mere revocable license and "may be recalled at pleasure, but after it "has been accepted and acted upon, it becomes "a contract within the meaning of the clause "of the Constitution which secures the inviol- "ability of contracts by declaring that no State "shall pass any law impairing their obliga- "tion" (Record, page 419).

But he does not quote almost the next preceding sentence (quoted above) which shows that what Judge ALLEN meant by the words "accepted and acted upon" was the fulfillment of *all the con-*

ditions expressed in the grant. Had these words any other meaning he would never have written the words "This is true" *supra.* Nor does Judge HAIGHT include in his quotation the sentences which immediately follow it, to wit:

> "This principle was incorporated into our "law by the Dartmouth College case. There- "fore, any law which takes away or material- "ly alters the Charter of any private corpora- "tion is unconstitutional unless the power to "alter was reserved when the grant was made. "I do not think that Chapter 499 of the Laws "of 1885 takes away or materially alters or "impairs the rights which the relator pos- "sessed by way of franchise prior to the pas- "sage of said act. This act does not take "away the relator's franchise, but simply reg- "ulates its use. The regulation in this act, "which prescribes that the electrical subways "shall be constructed according to a plan to "be approved by the commissioners, is an ex- "ercise of the police power of the State."

There is no syllable or word in Judge ALLEN's opinion that indicates that he did not hold that the franchise had been *both* accepted and acted upon by the relator, and there is no way of reading his opinion without seeing that he did so hold.

The suspicion never entered into his mind as a reading of his opinion will show. Those were very active days and every one was accusing the relator—not of being inactive, but altogether too active.

Another sentence in Judge ALLEN's opinion throws further light and justification upon the po-

sition then taken by the counsel for the relator (although they have been subsequently overruled by the courts), to wit, that not only did they consider that the Commissioners of Electrical Subways had no jurisdiction or authority over it, but that opinion was concurred in by the Commissioners themselves and their eminent counsel, Mr. Edward Lauterbach (fol. 56).

We read in Judge ALLEN'S opinion:

> "On the other hand, it appears that the re-
> "lator thought to convince them, that Chap-
> "ter 499 of the Laws of 1885 did not apply
> "to it."

That the Commissioners were so convinced appears from the record here (fol. 56).

This opinion of Judge ALLEN became the opinion of the intermediate Appellate Court, for his decision was affirmed on his opinion. 14 Daly, 154.

When the *Squire* case reached the Court of Appeals, Chief Judge RUGER wrote the opinion which affirmed the decision below. In his opinion he calls attention to the fact that the relator filed with the proper officials "maps, plans and tabular "statements as required by the ordinance and pro-"ceeded to collect the material and equipment nec-"essary to build its structures and transact its "business." This was not disputed or questioned. He nowhere intimates that the franchise was not "acted upon."

He takes up the four counts reviewed by Judge ALLEN against the constitutionality of the acts, and throughout his discussion he refers to what the respondent here calls "a Permission" as "the *contract* itself" (107 N. Y., 593), and as "the

"*franchise* secured by the relator." He points out that "the scheme of these statutes was not to an-"nul or destroy *the contract rights* of such com-"panies (as the relator), but to regulate and con-"trol their exercise," and justifies the acts in an able analysis of the decisions supporting the exercise of the police power of the State, and so sustains the jurisdiction of the Commissioners of Electrical Subways to designate how and when the streets should be opened up for the purposes of action by the relator under its franchise, and *holds* that the relator may not "tear up the streets of the "city at such times and under such conditions as "it might itself determine," but that the Legislature had the right to pass the Subway Acts and "to regulate the mode and manner of the enjoy-"ment of its rights" (page 607). On the same page as the concluding paragraph of the opinion he again refers to the ordinance of the City as the relator's "contract," and sums up his opinion as follows:

> "We do not think such a claim can be sus-"tained. It is neither within the terms of its "contract, and if it were it is still subject, in "the respects mentioned, to the police power "of the State."

This *Squire* case came before this court in 1892. The opinion was written by Mr. Justice LAMAR. He stated the facts upon which the petition for the writ in that case was based, including the fact that the relator immediately after its secondary franchise was granted and its map filed, proceeded to make "ready its material and "plans for the construction of electrical con-

"ductors and underground lines in the city," and the fact that the denial of a permit by the Commissioner of Public Works "was made because the "relator had not obtained the aproval of the "Board of Commissioners of Electrical Subways, "created by the Act of the New York Legislature, "approved June 13, 1885, Laws 1885, c. 499, of the "plans and construction proposed by the relator." (145 U. S., 175.)

This Court determined, as shown by that opinion, that the language of the act was broad enough to include all companies irrespective of the date of their incorporation, "operating or desiring to oper- "ate, either directly or indirectly, any line of wire "for telegraphic, telephonic or illuminating pur- "poses within the cities to which it is applicable, "the City of New York confessedly being the only "one affected."

But it is only fair to state that, unlike some of the opinions we have already quoted and are yet to quote, the opinion of this Court expressly left open the question as to whether the franchise of the relator constituted a contract; for we read:

> "In order to determine whether the relator's "essential rights have been invaded, or the "contract which it claims to have entered into "impaired, or its property taken away without "due process of law, it will be necessary to "ascertain what rights and property it pos- "sesses under the alleged contract of April "16th, 1883. This contract, if such it be, must "be gathered from the statutes of the State, "under which the relator was organized, and "the ordinances of the City (which it accept- "ed) by which its privilege of constructing an

"underground electrical system was con-
"ferred."

Mr. Justice LAMAR goes on to ask and answer this question: "In what way, therefore, did the "Acts of 1885 and 1886 impair this contract?" (page 190).

His answer is:

"The Statutes of 1885 and 1886 did not pro-
"hibit the relator *from carrying out the pur-*
"poses of its organization or from laying its
"wires underground" (page 190).

(See Point D *infra.*)

He paraphrases the situation as follows:

"They (the Subway Acts) simply said to it,
"'Submit your plans and specifications of
"'your electrical system to the Board of Sub-
"'way Commissioners, who will determine
"'whether they are in accordance with the
"'terms of the ordinances giving you the
"'right to enter and dig up the streets of the
"'city.' This the statutes had a right to do"
(page 190).

He sums up the whole effect of the statutes of 1885 and 1886:

"The utmost that can be said against the
"Acts of 1885 and 1886 is, that they trans-
"ferred the supervision and control of the mat-
"ters of excavation of the streets and the con-
"struction of underground electric systems
"from the Commissioner of Public Works to
"the Board of Subway Commissioners. That

"is the sum total of the change effected. * * *
"*It requires no argument or citation of au-*
"*thorities to demonstrate that such proceed-*
"*ings did not impair the obligation of the re-*
"*lator's contract.*"

Finally, he defends the statutes, as Chief Judge RUGER did, upon the ground that what the statutes did was within the police power of the State.

THE ELLISON CASE, AGAIN.

The present counsel of the relator, examining this record in the courts, and relying, as we have stated, *upon the express provisions in the contracts that no monopoly of subway construction was intended to be conferred upon the respondent*, believing that all errors of the past were eliminated if the application was made to the successor of the Commissioners of Electrical Subways (to wit, to the Commissioner of Water Supply, Gas and Electricity), and being advised that there was an existing demand as evidenced by over 100,000 applications or contracts from telephone users (fol. 318), brought the *Ellison* mandamus case.

Counsel relied, as former counsel had, on those provisions of the Subway Acts and the contracts with the respondent and its predecessor which asserted that none of them should be construed to give any monopoly or exclusive privilege *to occupy the streets with conduits.*

But that case finally held that notwithstanding those provisions, the respondent here (not a party to that proceeding) alone could occupy the streets with conduits for low tension wires and presumably that the provision against a monopoly merely

meant that it must open its conduits upon a fair rental to all those who had authority to lay electrical conductors in the streets.

The application for the writ was first made to the late Mr. Justice BISCHOFF and was opposed by the City upon several grounds, one of them being that the relator, because of non-user, had forfeited its franchise; but Justice BISCHOFF held that:

> "It is quite apparent, however, that the re-
> "lator did conform to the condition of the
> "statute, as expressed. It organized within
> "one year, and also commenced the transac-
> "tion of its business, for it obtained a fran-
> "chise from the City to lay wires underground,
> "one of the purposes of its incorporation, as
> "stated in its charter. The statute did not
> "require that it should commence the work of
> "construction of electrical subways, nor that
> "it should undertake any particular endeavor;
> "one step in the transaction of its business,
> "within the year, was a commencement, and,
> "when obtaining a franchise from the City, it
> "took that step and did commence the trans-
> "action of business.
>
> "The corporate life of the relator was not,
> "therefore, brought to an end by the statute,
> "and if its subsequent inaction was to affect
> "its right to exist, this was a question for the
> "State to raise in direct proceedings for the
> "annulment of the charter (*People* vs. *W. & D. R. R.*, 128 N. Y., 240, 248).
>
> "So, too, it may be held that the franchise
> "from the City, obtained by the relator in the
> "year 1883, *was irrevocable by the City be-*
> "*cause not forfeited by any term of the agree-*

"*ment itself* (*People* vs. *O'Brien*, 111 N. Y., "1); but as I view the case, the application "must be denied upon the ground that the "franchise was modified by the State in the "exercise of the police power, and that the re- "lator's individual right to open the streets "for the laying of electrical conductors in con- "duits of its own had passed" (51 Misc., 413). (The italics are ours.)

The application was denied, solely, upon the proposition, as summed up in the two concluding paragraphs of his opinion, that it was "based upon "the relator's franchise to lay wires under the "streets, and is not founded upon facts showing the "failure of the respondent [the City is obviously "meant] to provide sufficient general facilities for "the operation of electrical conductors. Indeed, "the only facts presented upon this branch of the "subject are contained in the respondents' papers "and disclose the sufficiency of the present system "to meet all requirements."

Thus he clearly held that there was a monopoly established in the respondent and its predecessor to be the sole builder of subways and the dispenser and lessee of places under the streets of New York, into which the wires of others having lawful authority might be inserted, and his opinion in this regard was sustained, as we shall see, by the Court of Appeals and has, perforce, been acquiesced in by the relator and it now makes no contention against this adjudication, or any of the preceding ones.

The learned justice concludes as follows:

"As I have noted, the relator's franchise has been "so modified by competent legislation that it can-

"not assert an individual right to operate its own "subway system, and this assumed right being the "sole basis of the application before me, I must "hold that the papers do not justify the granting "of a writ of mandamus."

Thus there was a strong intimation that he would have granted a mandamus if the application had been made for the laying of wires in the existing subways, and we find the Court apparently rendering an opinion that the relator obtained in the year 1883 an irrevocable franchise from the city which had not been forfeited by any term of the agreement itself. He cites an authority to sustain that proposition and the sentence, *supra*, beginning, "So, too, it may be," etc., follows a positive assertion regarding another contested proposition, so that counsel for the relator have always felt, and still feel, that they were fully justified in interpreting the sentence we have above quoted as meaning that the court definitely held that the relator's franchise was an irrevocable contract, although, subsequently, and in the case at bar, the same justice held that this assertion was only an argumentative assumption "that this consent by "the Board of Aldermen was irrevocable upon the "part of the municipality" (fol. 1167).

This was the construction put upon it by the courts, as well as by relator's counsel. *Matter of Long Acre Co.*, 51 Misc., 407, 412.

After Mr. Justice BISCHOFF had denied the writ in the *Ellison* case, the matter came before the Appellate Division of the First Department of the N. Y. Supreme Court, and the presiding justice wrote an opinion which we shall not attempt to analyze in any detail, because the Court of Appeals did not

seem to adopt its reasoning or conclusions, but rather the view taken by Mr. Justice BISCHOFF in respect to the rights of the relator, and also because that opinion, as it seems to us, is the result of confusing the incidental steps that have to be taken by the relator under the acts of 1885 and 1886, and those initial ones that are required to be taken when any application is made to the City to lay down particular wires in respondent's subways under the franchise of the relator. Both have to be taken. See the *Long Acre Case*.

Those under the franchise of 1883 including the ordinance of 1878 have all been performed by the relator, as was held by Judge ALLEN, *supra*, and conclusively shown by this record.

Those under the Subway Acts were the steps which were then taken by the relator in the *Ellison* case upon its application to the successor of the Commissioners appointed under the Subway Acts.

The map which had to be filed under the ordinances of 1883 and 1878 was a general plan of the places wherein the relator expected ultimately to place its wires and where it wanted the permission so to do, under its state franchise.

The maps to be filed under the Subway Acts, when permission was asked for definite immediate construction, or the placing of wires, at particular points were maps or plans showing designated places where the applicant desired to open man-hole covers to place wires in conduits already built under the Subway Acts.

Such a map is found on page 281 of the record; while the three hundred dollar comprehensive map

filed in accordance with the ordinances of 1878 and 1883 is Exhibit G, described in the record at page 64. (See also Ch. J. RUGER's opinion, page 16, *supra.*)

Previously, in the *Squire* proceeding, the application had been made to an official who had no jurisdiction. That was in 1886. But in the *Ellison* case application was made to the official who the Court of Appeals and this Court had determined was the proper one, and hence the statement of Mr. Justice INGRAHAM that he had "searched this "record in vain to find that the relator stands in "any different position in relation to its rights to "a permit to use the public streets than it did in "1886, when its application for a mandamus was "made and denied," is based upon several erroneous assumptions.

These initial errors in the view taken of the whole situation led the learned Appellate Division to suppose that the *Squire* proceeding was determinative of the *Ellison* proceeding. But even in this opinion of the Appellate Division it is emphatically asserted that: "All corporations desiring to use the "streets of the City of New York for electrical con- "ductors have occupied these subways, and there "is no allegation that this relator cannot obtain "space in these subways for the use of any electrical "conductors that it may desire to use" (115 N. Y. App. Div., at 262).

The remaining portion of the opinion of INGRAHAM, P. J., is directed solely to the right of the relator "*to construct subways.*" The expression occurs several times on almost every page, and never is the franchise of the relator referred to except in connection with this right "to construct subways."

Thus the learned Court says:

> "That a right granted more than twenty "years ago *to construct* subways in the public

"streets, where no attempt has been made to act "under it, and where, in the meantime, *the "public authorities have provided ample means "for the use of those desiring such a use as "was authorized by this grant,* may well be "considered as having lapsed and cannot now "be revived, in violation of the rights acquired "by others and to the public disadvantage" (page 262).

Then follows a sentence with which we have now no quarrel provided we are allowed to assert that there is implied in it the words which we have inserted and enclosed in brackets:

"Nor do I think there was any contract [to "construct subways] between the relator and "the City of New York which was impaired by "this action of the legislature and the Board "acting under its authority" (page 262).

So again he says, and here again we insert in brackets what should have been, and perhaps, was, intended:

"To constitute a contract between the City "of New York and the relator [for construct-"ing subways] I think something more must "exist than the mere granting to the relator of "permission to use its streets" (page 263).

He then discusses the well established proposition that the franchise comes, not from the city, but from the state, and concludes:

"The relator gets its right to use the streets "from the State. But that right does not ac-"crue until the municipal corporation gives

"permission. When that permission is once "given then the right is complete. But it can- "not be that a municipal corporation, having "given its permission, is bound hand and foot "so that the permission can never be revoked, "although the corporation neglects to act un- "der it and *construct its lines* for such a "period as would divest a person of real prop- "erty by adverse possession. All of the ele- "ments of a contract are wanting. The re- "lator assumed no obligation whatever in re- "lation to the *construction of the subway*. All "it ever agreed to do was that when it built "the subway it would comply with the condi- "tions imposed. Until the permission granted "was accepted by some act of the corporation "under it I think there was no contract" (page 263). To which we believe there should be added: *"to allow it to construct subways if "others have been in the meantime supplied for "it."*

In a word, there is little or nothing in the opinion to indicate that the learned Court at the Appellate Division went further than to hold that *in so far as* the municipal grant of 1883 to the relator gave permission *to construct* conduits in the streets, it was revocable by the legislature (in fact, had been revoked by it or regulated under the police power of the sovereign right of the State, by the Subway Acts), or by the city in case no subways were constructed; but the Appellate Division did not hold, as a very careful reading of Mr. Justice INGRAHAM's opinion will show, that the relator did not have an irrevocable grant and franchise *to lay*

its wires in the streets subject to proper municipal regulation including the placing of them in conduits constructed by the city, or by the city's agent, the respondent, and this, we respectfully submit, is true, notwithstanding such sentences in the opinion as "All the elements of a contract are wanting," because we believe that what was meant by that sentence is "All the elements *of a contract* "*to construct subways* are wanting since the right "to construct them has been held to be subject "to the police power and taking away the right to "construct does not vitiate the balance of the con- "tract in which all the elements of a contract are "present."

As we have already stated, however, neither the opinion of the Appellate Division nor its reasoning was adopted by Judge CHASE, who wrote for the Court of Appeals. It was forcibly called to that court's attention, not only because the opinion of the presiding justice of the court below, was before the court, but because it was upon the brief of the Corporation Counsel, as it is in the brief of the respondent here.

What Judge CHASE did say has a very important bearing upon the present proceeding. His attention is, of course, entirely centered upon the question of the relator's right to construct subways, and he brushes all technicalities aside and devotes himself to a consideration of "the important ques- "tion of the merits of the relator's claim to proceed "as a matter of right to open and excavate in the "streets of the city and construct a complete public "system of electrical subways therein."

"In the consideration of that question" he says, "we will assume, without deciding, that the re-

"lator's corporate powers have not ceased, and that "whatever rights the relator obtained by the per- "mit of April 10, 1883, hereinafter referred to, so "far as the same is necessary for the purpose of "carrying out the principal, fundamental and es- "sential purposes of the relator's incorporation, "were and are irrevocable. *What are the principal, "fundamental and essential purposes of the re- "lator's incorporation?*"

The learned judge then ably shows that the fundamental purpose of the relator was to lay wires in the streets for electrical communication, and that the building of conduits was as incidental to its essential privileges and duties as the telegraph pole was to the telegraph company.

It is not the essential purpose of a telegraph company to erect telegraph poles, nor of a company like the relator to build subways.

The essential purpose of each is to furnish means —that is, wires—either overhead or under the surface of the ground over which electrical currents may pass for the purposes of communication, and because of these considerations he reasoned that the Subway Acts might be construed to have taken away the right to build conduits and yet in no way have infringed upon the essential rights of the relator—no more than they infringed the essential rights of the telegraph company when it was compelled to cut down its telegraph poles and to place its wires underground.

The Subway Acts and Contracts expressly provide that the *wires* placed in their conduits are to be owned by the tenants (fol. 118).

Judge CHASE says:

> "The line of telegraph wires was a necessary "and essential part of the telegraph plant,

"while the poles and brackets were simply the "means by which the wires were held in "place" (page 527).

And again:

"The construction of conduits is only au- "thorized by the acts *as an incident* to the con- "struction of lines of electrical conductors un- "der the ground" (page 529).

Again he says:

"Whatever the incorporators may have had "in mind when the articles of incorporation "were signed, a reading of the acts upon which "the incorporation is based and the articles of "incorporation SHOWS CONCLUSIVELY THAT THE "PRINCIPAL, FUNDAMENTAL AND ESSENTIAL PUR- "POSE OF ITS INCORPORATION, AND OF THE PER- "MISSION GRANTED TO THE RELATOR BY THE "BOARD OF ALDERMEN, WAS TO CONSTRUCT, USE "AND MAINTAIN LINES OF WIRE FOR CONDUCTING "ELECTRICITY, AND THAT THE CONDUITS IN "WHICH THE WIRES WERE TO BE LAID WERE AND "ARE MERE INCIDENTS TO SUCH PRIME PURPOSE" (page 530).

THE CASE AT BAR IN THE STATE COURTS.

This last quotation is most important, because it was entirely repudiated by the decision of Judge HAIGHT in the fourth proceeding, to wit, the present one, brought by the relator. In other words, when the relator asked permission to construct, it was told by the Court of Appeals in Judge CHASE'S

opinion, that that right had been taken by the Subway Acts and that such taking away was not illegal, *since the right was only incidental.* But when the relator, as we shall presently see, asked permission to go into the subways in the present proceeding, the Court of Appeals by Judge HAIGHT held "THAT THE MAIN PURPOSE OF THE RELATOR'S "INCORPORATION AND OF THE PERMIT GRANTED BY "THE CITY WAS TO CONSTRUCT UNDERGROUND PASS-"AGES FOR THE LAYING OF WIRES," etc. (page 417 of Record), and this having been taken away by the Subway Acts, there was nothing left!

Simultaneously with the decision in the *Ellison* case, the Court of Appeals decided a case to which we shall refer as the *Long Acre* case, wherein it was *held* that a corporation, situated as was the relator here, should apply first to the Subway Company to be assigned space in its subways before it applied to the Commissioner of Water Supply, Gas and Electricity, for the necessary permit. Both applications were held to be necessary and the proper order was as we have indicated (Matter of the *Long Acre Co.*, 188 N. Y., page 361).

We do not dispute,—in fact, we assert and contend, agreeing with our opponents—that the respondent has the express right under the statute to refuse to allow the relator or any other applicant to place wires in its conduits unless the applicant has lawful power and authority so to do. To show that authority the applicant must prove that it possesses just such a franchise as the relator possesses from the state, seconded by the municipal permission or franchise (see also page 34 *infra*).

What the public authorities, the state courts and this Court have decided.

IT WAS DETERMINED by the Board of Aldermen in 1883 that the relator should be granted a franchise to build conduits and place wires for telegraphic and telephonic purposes under the streets of New York City upon filing a map, and without limitation of time or the fulfillment of any other condition precedent, except to promise to pay therefor per foot and in certain events 2% of gross receipts (pages 58-60 of Record).

IT HAS BEEN DECIDED by two Attorney Generals of the state that no action would lie on behalf of the people of the state against the company for forfeiture of its charter by reason of any alleged non-user (fol. 59, 336-363).

IT HAS BEEN DECIDED that the right to construct its own conduits in the streets was taken away by the legislature in 1885 (*People ex rel. N. Y. Electric Lines Co.* vs. *Ellison*, 51 Misc. 413, 115 App. Div., 254, 188 N. Y., 531).

IT HAS BEEN DECIDED that this action on the part of the legislature was within the police power of the state (*People ex. rel. N. Y. Electric Lines Co.* vs. *Ellison*, *supra*).

IT HAS BEEN DECIDED that this did not take away the essential part of the relator's franchise, to-wit, the right to lay electrical conductors in the streets

of the city in such conduits as the city should provide, either itself or through the medium of a conduit company such as the respondent (*People ex rel. N. Y. Electric Lines Co.* vs. *Ellison, supra*).

IT HAS BEEN DECIDED that companies desiring to lay wires in the streets should apply first to the respondent to be assigned space and *then* to the city authorities as hereinafter stated. (Matter of *Long Acre Co.*, 188 N. Y., 361.)

IT HAS BEEN DECIDED that this right is enforcible by mandamus. *Idem.*

IT HAS BEEN DECIDED that the respondent may refuse any company space if it has not lawful authority to lay wires in the streets. *Idem.*

IT HAS BEEN DECIDED that in the exercise of its franchise the relator must next apply to the city authorities to open the streets at any particular place for the purpose of placing its wires in conduits therein (*People ex rel. N. Y. Electric Lines Co.* vs. *Squire*, 14 Daly, 154; 107 N. Y., 593; 145 U. S., 175).

IT HAS BEEN DECIDED that the proper municipal official to issue such a permit to the relator was not the Commissioner of Public Works or his successor, but was the Board of Subway Commissioners and its successors, its present successor being the Commissioner of Water Supply, Gas and Electricity (*People ex rel. N. Y. Electric Lines Co.* vs. *Squire, supra*).

IT HAS BEEN DECIDED that the main purpose and right of the relator is not to build conduits but to lay wires for telegraphic and telephonic use and *for that reason alone* the Subway Acts are constitutional. (*Squire Case,* 145 U. S., 175; *Ellison Case,* 188 N. Y., 523 and page 30, *supra.*)

IT HAS BEEN DECIDED TO THE CONTRARY, in this case that the main purpose, and right of the relator is to build conduits and not to lay wires for telegraphic and telephonic use, and for that reason it is proper to revoke relator's license, for all its rights were taken away by the aforesaid subway acts. Opinion, page 417 of Record, and page 31, *supra.*

THE OPINION OF THE COURT OF APPEALS IN THE CASE AT BAR.

Thus there came to the Court of Appeals and now comes to this Court, after many years this clear and distinct issue, which must now be determined, as to whether the relator's contract with the state and city has been impaired, and whether its property has been taken away without due process of law, when the New York courts held, in this proceeding, that the relator's contract or franchise was a mere revocable permission or license which was effectively revoked in 1906 by a resolution of the Board of Estimate and Apportionment, acting, it must be presumed, under some alleged delegated power of the state.

Before reviewing what was determined in this case by analyzing the opinion of Judge HAIGHT in

the Court of Appeals, it is necessary to restate just what was determined as to the essential character of the relator's contract by the Court of Appeals in the *Ellison* case, and by this court in the *Squire* case.

It is only by doing so that an adequate appreciation can be had of the grave injustice which the relator has suffered by the inadvertence of that court in overlooking what was there determined. The able opinion of Judge CHASE, the learned judge who wrote in the *Ellison* case (in which decision and opinion, the relator has acquiesced by abandoning its appeal to this court) *held*, that "the construction of conduits is only authorized "by the acts (*i. e.*, the Telegraph Act and its "amendments under which the relator was incor- "porated) as an *incident* to the construction of "lines of electric conductors underground," and further, "*that whatever the incorporators may have "had in mind when the articles of incorporation "were signed, a reading of the acts upon which the "incorporation is based and the articles of incor- "poration shows conclusively that* THE PRINCIPAL, "FUNDAMENTAL AND ESSENTIAL PURPOSE *of its in- "corporation, and of the permission granted to the "relator by the Board of Aldermen, was to con- "struct, use and maintain lines of wire for con- "ducting electricity, and that* THE CONDUITS IN "WHICH THE WIRES WERE TO BE LAID ARE MERE IN- "CIDENTS TO SUCH PRIOR PURPOSES" (188 N. Y., 523).

And further, that "construction and mainten- "ance of the conduits bear *the same incidental re- "lation* to the real purpose of a Telegraph Corpora- "tion that the erection and maintenance of the poles "bore to such real purposes when the wires were

"strung upon poles instead of being placed under "ground." The Court then *holds* that, since, and wholly, because the Subway Acts took away only this incidental right, both from the Telegraph Companies to maintain poles, and from the relator to build and construct its own subways, the Acts were constitutional and there was no deprivation of property, except such as was authorized under the police power of the state. This reasoning is very similar to that of this Court in the case of *Pearsall* vs. *The Great Northern,* 161 U. S., 646, cited in the briefs already filed, although perhaps not in this connection.

But the opinion of the learned New York Court in the case at bar, wholly ignores its finding in the former case and the conclusion reached by this Court, in the *Squire* case and *holds* that "*the main* "*purpose of the relator's incorporation and of the* "*permit granted by the city, was to construct un-* "*derground passages for the laying of wires or* "*electrical conductors,* for the purpose of renting "to persons or corporations, having the power to "conduct the business of electric lighting, tele- "graphing or the maintaining of telephonic com- "munication" (page 417 of the record). Judge HAIGHT further *holds* that the relator "has never "been granted a franchise to occupy the conduits "for the purpose of engaging in the business of "electric lighting, or of supplying transmitters "and receivers for telephonic communications, or "of instruments for telegraphing;" whereas, the fact is that that privilege and franchise is the main purpose of the relator's incorporation. It was the doing of those very things, which the learned justice himself in the preceding sentences of his opin-

ion, on page 417, asserts and admits constituted the main purpose of the relator's franchise, for he says, "the resolution of the common council permit-"ted the *relator to lay its wires or other conductors "of electricity in and through the streets, and to "make connections of such wires underground by "means of necessary test boxes and distributing "conduits, and thence above ground to points of "electrical illumination and telegraphic and tele-"phonic signals, for which the relator agreed to pay "to the city two per cent. of its gross receipts de-"rived from the rental of its wires.*"

As we have pointed out, the Court had already held that this actual laying of conduits was no more the *main purpose* of the company, as evidenced by its articles of incorporation, and by the resolution of April, 1883, than it is the main purpose of a telegraph company to erect telegraph poles, and for that reason alone the Subway Acts could be sustained as constitutional as against this relator, because they had not taken away, by forbidding it to construct subways, the main thing granted to the relator.

Judge HAIGHT then holds that since the Subway Acts have taken away the right to build conduits, and since that right is the main purpose of the relator and of the resolution of 1883, the relator *has nothing left* and its franchise has been obliterated by the Subway Acts. That they are constitutional he asserts on the authority of Judge CHASE'S opinion in the *Ellison* case, and thus in this vicious circle, the relator has lost its property; but we submit "without due process of law."

It has received a solar-plexus, or what in sporting parlance is sometimes called a double cross. It is of that we complain.

The dilemma is clean cut and cannot be evaded. If the Subway Acts of 1885 took from the relator the main purpose of its being, i. e., the substantial property conveyed to it (under its charter from the state supplemented and made vital under the resolution of April, 1883), then they were unconstitutional. If they did not, as the Court of Appeals and this Court has held in the *Squire* case, and as the former held in the *Ellison* case, then it is entitled to do the substantial thing that is left, to wit, lay its wires in the streets; this has always been its main purpose. The respondent suggests no escape from one of these alternatives.

The whole record before this Court shows that the main purpose of the company is correctly stated by Judge CHASE, *supra*. Even Mr. Cahill's affidavit tells of conversations with Shelbourne in which, while he stated that his company had never intended, and did not then intend to do a telephone business, but only to aid others in doing it, he spoke of laying wires, of owning wires and of placing them in the streets. He did not speak of building conduits; for at that time conduits were never mentioned except incidentally as "distributing conduits." What was intended, was to lay *cables* covered with insulating material. The mere titles of the seventeen patents which the company acquired show this (fols. 614 to 617). It is true that subsequently, as the art developed, conduits or subways were found to be the more practicable; probably because it was easier to insert additional wires for the various purposes in the conduit than to lay cables, which would necessitate the tearing up of the streets for long distances instead of pulling the wires through from manhole to manhole.

The entire opinion may be said to rest upon this misapprehension and of this forgetfulness of what had already been decided by the courts, both federal and state.

Upon those former decisions the relator had relied, as it had the right to, and had acted, acquiescing in it and submitting itself to them, only to find that the proposition upon which it was relying was to be repudiated by one of its parents—the state court.

The opinion further asserts that it is the present intention of the relator to rent its wires to other persons after it shall have placed them in the conduits of the respondent and the respondent's brief treats this alleged purpose as a crime; but we know of no reason why, if it were to be admitted that such was its intention, that fact should be ground of objection either on the part of the Court or on the part of the respondent. The relator asks what it has a right to receive, to wit, the assignment of space in the subways wherein it can place its wires. It may be possible for it to hereafter attempt to use them for illegal purposes, but when that question does arise, there are ample remedies to prevent any abuse of its privileges, if the relator should attempt to misuse them.

But there is nothing in the record to show that any illegal use is contemplated.

The respondent certainly cannot claim that it is illegal for a company organized under the telegraph act to lease either space or wires to others, for that is what it does itself. So too its sole stockholder and principal tenant leases the wires installed in the conduits to others for private as well as public use. See Point C, *infra*.

The opinion further refers to the twenty-three years that have elapsed without any further action on the part of the relator to use the conduits of the respondent. That has not hurt the respondent, for it resists the proposition that it should receive the wires; it does not want the relator as a tenant and does not wish its wires to be placed in its conduits. A landlord who does not want a tenant should not complain that the tenant claiming a right to enter has been tardy in making application.

But the learned judge also wholly ignores the mandate of the state which expressly provides that until there is a public demand the relator and all others should not seek to initiate any system which would necessitate the building of additional subways, although the very statute which so provides is quoted in the opinion in another connection (page 416 of the record).

Nowhere has the respondent ever answered our contention concerning the effect of the statute of 1892 in this regard. Laches, however, has never been seriously urged in this case and the Court of Appeals has recently held that laches do not apply in a case like the one at bar. *Pollitz* vs. *Wabash R. R.*, 207 N. Y., 113. This Court has even more recently held that where litigation is conducted in good faith and as a result a final application for relief is delayed, the applicant is excused, even if otherwise the doctrine of *laches* might apply. *Northern Pacific Ry.* vs. *Boyd*, 228 U. S., 482. In that case the dissenting opinion by Mr. Justice LURTON shows very clearly how much more favorable for the relator is the case at bar than was that case for the complainant.

Further than all this, in the case at bar *laches* is a defense which appeals to the discretion of the Court, and in the case at bar there is no room for discretion and no discretion was exercised because the writ "was in all respects denied as a "matter of law and not in the exercise of dis-"cretion" (fol. 17).

Elsewhere we have discussed that part of the opinion which considers the federal questions involved under the constitutional guaranties.

The provision in the XIV amendment of the federal constitution that "no person shall be de-"prived of property without due process of law," was ignored by the Board of Estimate and Apportionment, not only by attempting to pass the revoking resolution of 1906, but also by passing it without notice to the relator.

People ex rel. Lodes vs. *Dept. of Health*, 189 N. Y., 187.

Traction Co. vs. *North Arlington*, 67 N. J. L., 162.

Jersey City Ry. Co. vs. *Passaic*, 68 N. J. L., 110.

So we might mention other errors in the opinion, but they are sufficiently referred to elsewhere in our brief. It is, however, proper to call attention to some questions (not statements) in the concluding paragraph of the opinion (page 420 of the record), which show that the learned judge was

influenced by the atmosphere sought to be thrown around the case, by the wild assertions unsupported by any probative or material evidence, by the respondent's counsel and by the affidavit of his associate counsel, Mr. Cahill. A similar, though less violent, attempt is here made. It is the cry of "Stop thief." The attempt in the Court of Appeals was in part successful, for the learned judge writing, asks: "Should a public service corpora-"tion be permitted to acquire an irrevocable fran-"chise by mere acceptance without spending a dol-"lar by way of performance, and then hold up the "public in its enjoyment of the privileges contem-"plated by the grant indefinitely or until they can "be bartered away for a fortune?" Manifestly not; although we are not prepared to say that while such a condition of affairs might be quite regrettable from many points of view and open to criticism, yet it might be possible under the law and constitution. But whether or not it is illegal, or only criticizable and regrettable, the question has nothing to do with the case at bar if it is analyzed with any care at all.

The question coming at the end of the opinion and in a way appearing to be an attempt to summarize the situation, is serious enough to merit careful analysis.

An irrevocable franchise can be obtained by "mere acceptance" as a grant of land can be, but in the case at bar, there has been more, and much more, than "mere acceptance."

There has been a fulfillment of all the conditions precedent—the expenditure of $300 for a map, etc., including a positive promise and obligation on the

part of the relator (to which Judge CHASE in his opinion calls attention) to pay two per cent. of its gross receipts to the city and to furnish wires and other facilities to the city free of charge, etc. This consideration, whether it looks small to-day or large, in 1883 loomed as an unprecedented and astounding proposition. Even to-day two per cent. of gross receipts is a large sum to pay for a municipal franchise. If the company makes twenty per cent. profit out of its gross receipts, two per cent. of its gross receipts means ten per cent. of that profit. If the company makes eight per cent., it means a payment to the city of twenty-five per cent. of its net income. Mutual promises in a contract are something more than "mere acceptance" of a grant, and constitute a good consideration, oftentimes, far more valuable than a large cash payment.

But to continue in our analysis of the learned judge's opinion,—the case at bar is not one where anything is asked for "without spending a dollar "by way of performance." Tens of thousands—nay—several hundred thousand dollars were spent —a large portion of it in the actual fulfillment of the necessary steps in the difficult manufacture of cables and insulating materials. The patents purchased were part of the performance of the installation of wires. All of these dollars were spent in reliance upon the city's agreement to allow the wires to be placed under the streets. The only denial contained in the answering affidavits is that all of $400,000 was not so spent.

Again the question we have quoted finds no basis in the record for its suggestion that the relator "can hold up the public in its enjoyment of the "privileges contemplated by the grant indefinitely."

That was, and is, of course, impossible. The error is apparent; for the learned judge forgot that this was not a case where the relator was claiming any *monopoly* in the streets as was the case in *Capitol City Light Co.* vs. *Tallahassee,* 186 U. S., 401, quoted by the respondent (see pages 31-32 of its brief). The failure of the relator to occupy conduits did not deprive the city or any other corporation or any individual, whether they constituted the public or not, from the enjoyment of any privilege—on the contrary, it left more conduits empty for others to use.

As a matter of fact, the city, or rather the state, prohibited the relator from exercising or using its franchise by the statute of 1892, except under certain conditions.

Finally, the last clause of the question certainly finds no warrant in the record, for the relator is forbidden to assign or transfer this secondary franchise by the terms of the resolution of April, 1883, or if that is not altogether so, it is still true that the assignment of the franchise or the selling it for a dollar or for a fortune, in no way harms the city or the respondent, and certainly is not a question to be considered in passing upon the question as to whether the revoking of the franchise is in contravention of the Constitution of the United States. It is not an assignee of the relator who is asking to place wires in the streets or claiming lawful power so to do. Then, how can this question arise? The inquiry is pertinent—the answer difficult.

This whole question, put by the learned Judge at the close of his opinion, if thus analyzed, is useful, at least in showing clearly, the misconceptions

under which the Court was laboring when the opinion was rendered.

To complete the history of the litigation in the case at bar, it only remains to note that a motion for a re-argument before the Court of Appeals was made and denied (202 N. Y., 587), and thereafter, in October, 1912, a writ of error duly issued from this court to the state court.

OUTLINE OF FACTS,

In Reply to Respondent's Attempt to Raise Irrelevant Issues.

In reply to the respondent's attempt, especially in its "Statement of Facts" (pages 2 to 56), to raise irrelevant issues, tending to greatly confuse and mislead the reader, it is easily shown that the greater portion of the facts of which it treats are wholly irrelevant; that most of them are unsupported by the record; that others of them support our contentions, and that all of them, without exception, fall in one or more of these classes.

In dealing with the facts we might safely rely upon the irrelevancy to any vital issue of nine-tenths of those upon which the respondent's counsel relies; but out of abundant caution we shall also show that they are supported by no probative evidence.

This seems necessary because respondent's brief is confusing, not only in regard to what it irrelevantly discusses, but also because it altogether misconstrues what has heretofore been decided.

The Facts Upon Which the Issue Before This Court Turns, and the Attempt of Respondent to Add to Them.

THE ESSENTIAL FACTS.

A. The statutory obligation of the respondent to furnish conduits for the wires of all companies "having lawful power" to lay them in the streets.

B. The relator's lawful authority to enter the conduits, as established by its articles of incorporation, by the secondary franchise granted by the Board of Aldermen, by its acceptance of it, and the fulfillment of every condition precedent.

EACH OF THESE FACTS IS PROVED BY UNDENIED AND INCONTESTABLE PUBLIC DOCUMENTS, AND HENCE PRESENTS NO ISSUE.

C. The demand by the relator and the refusal of the respondent.

This is not denied.

D. The fulfillment of all the terms and conditions of the agreement itself.

This is conclusively proved and is practically admitted.

These undisputed and indisputable facts are all sufficient. They are met by the respondent with a number of strenuous, irrelevant and unproved allegations contained partly in answering affidavits, which are inadmissible as evidence, and partly by unwarranted assertions in its brief.

Among them are the following (those which are not relied upon in the brief filed by respondent's counsel we have marked with an asterisk, and, we assume, can be wholly ignored as abandoned):

*(a) The relator company is alleged to be impecunious (fols. 412, 440-444).

*(b) The company or its principal stockholder is about to be guilty of a vicious financing scheme.

*(c) It has issued a prospectus in which there are statements, which, it is alleged, are misleading.

(d) Since its stock is owned by another company, it has violated its franchise because the respondent claims that it had thus practically assigned it to the new company (fols. 388-397, 400-401, 411-412; see page 12 of respondent's brief and Point L, *infra*).

*(e) The relator is dead because it did not exercise its powers during the first year of its incorporation (fol. 373; source of information not disclosed).

(f) The relator has never laid any wires in the streets of the city.

*(g) The five thousand dollars tendered by the relator as the first year's rental was not the relator's own money (fol. 408; source of information not disclosed).

*(h) The company did not intend to keep the tender good (fol. 409; source of information not disclosed).

*(j) Relator did not have as extensive a factory or as many business offices as it alleges (fols. 307-311, 314-322, 325-326, 921, 932, 940-964, 973-978; over 48 folios; respondent's brief, page 5).

*(k) No patents were taken out in the company's name, but they were assigned to it only after Mr. Shelbourne's death (fols. 477-479).

*(l) Relator did not carry out any plan of its own, but from 1884 to 1886 sought to build a

general system of subways (fols. 458-459), and continued its endeavors until, at least, August 23, 1886 (*id.;* respondent's brief, page 5).

*(m) If the multiple switchboard patents owned by the Bell Companies prevented the relator from doing a telephone business in a large city, then, since "its certificate of incorporation author-"ized it to do a telegraph business" (respondent's brief, page 6), it should at once have undertaken such a business.

(n) In smaller cities than New York independent telephone companies installed multiple switchboards (of capacity undisclosed by the expert affiant who must have known, fols. 598, *et seq.*) from manufacturers who gave guarantees *against suits for infringement* (respondent's brief, page 6, fols. 477-479, 584, 585, 590, 592, 621), and hence the patent situation did not prevent the relator from doing a telephone business in the large city.

(o) The purchase of the 17 patents by the relator, for manufacturing cables, etc., was not "doing business," because no conduits were constructed (respondent's brief, page 7).

(p) The relator only spent a portion of $400,000 from 1900 to date, while another portion was spent "by stockholders and those in contractual "relation with it" (respondent's brief, page 7).

(q) If the relator places its wires in respondent's conduits, it might thereafter attempt to lease

its wires to different corporations, and that, it is claimed, would be unlawful (respondent's brief, page 10).

*(r) Another telephone company offered, some years ago, what respondent thinks are better terms to the City of New York (fols. 422-424). It is not alleged that it was able to perform or the city able to grant.

(s) The company has not paid its franchise tax for 1909 and 1910 or its personal taxes, and the respondent is not sure whether or not it has paid its other taxes; although complete proof of the fact is in the record (fols. 512 to 522, 524 to 531). It paid the franchise tax from 1901 to 1905 and all previous taxes (see fols. 435-439, 512-522, 524-531).

(t) The relator has not entered into any contracts with telephone users, but has merely received applications from them (fols. 445-453).

(u) Having the right to build conduits, having intended to build them, having failed to build them, and having been forbidden by the Subway Acts (passed under the police power of the State) to build them, the company has lost the right to exercise any of its other franchises or functions (respondent's brief, pages 2, 3, 19-26; fols. 370-372, 402-406, 462).

The mere statement of these so-called facts and irrelevant contentions demonstrates their futility.

THE CAHILL AND OTHER ANSWERING AFFIDAVITS.

The principal affidavit submitted by the respondent is made by Mr. Cahill who, as the record shows, was one of the respondent's counsel in the state court.

It consists largely of conclusions of law and nearly all of its statements of fact are necessarily on information and belief, although in only two instances are they stated to be so founded; and in those two instances the source of the information is not given.

This affidavit is referred to almost exclusively in the folio references of respondent's brief submitted to this court (see pages 3, 4, 5, 6, 7, 8, 8a, 9, 10, 13, 14, 18, 24, 25, 47, 52 and 56). The affidavit covers folios 367 to 504.

It is only necessary to call the Court's attention to the established rules which must be applied to all affidavits upon which vital issues are determined, if great injustice is not to be done litigants, and especially litigants who rely upon the courts applying such rules. It is our belief that it was partly the failure of the New York Courts to be mindful of them which resulted in the defeat of the relator's constitutional rights and privileges in this proceeding.

The rules of the New York Courts are simple and in this instance easily applied.

A statement, however positively alleged, will not be considered, unless it affirmatively appears that the affiant has personal knowledge of the facts to which he deposes, or gives the source of his information. *James* vs. *Signell*, 60 App. Div., 75.

Affidavits on information and belief are worthless unless reliable sources are *circumstantially* given. *Eichner* vs. *Met. St. R. R.*, 114 App. Div., 247. (See also cases cited by MCLAUGHLIN, J., in

dissenting opinion in *Dorr* vs. *Esders*, 112 App. Div., 897.)

Where sources of information are given, they must be as reliable as can be reasonably obtained.

The allegation of a general fact or of a conclusion is wholly insufficient to prove the fact *Dain's Sons* vs. *McNally Co.*, 137 App. Div., 857. See also cases there cited.

A conclusion of fact, such as is proper in a complaint, is not evidence, and has no weight *either as a denial or an affirmation*, unless supported by the facts duly alleged from which it is necessarily drawn. *McCullagh* vs. *Acby*, 9 N. Y. Supp., 361.

A conclusion of law, however alleged, adds nothing to an affidavit and must be wholly disregarded.

Where the source of information is documentary the Court must have the writings before it "in order to see whether the affiant is justified in his belief or not." *Gumbes* vs. *Hicks*, 116 App. Div., 120; citing *Ladenburg* vs. *Bank*, 87 Hun, 269, 275, aff., 146 N. Y., 406, and *Barrell* vs. *Todd*, 65 App. Div., 22, 26.

The affiant's belief is not material.

No attention will be paid to the assertion that information has been obtained from an individual when his name is concealed; partly because it puts the other party in the position of being unable to even contradict the assertion that the information was given.

POINT A.

In answer to Point I of the Respondent's Brief, wherein it is claimed that this appeal should be dismissed as not necessarily involving a Federal question.

The respondent's counsel puts his contention thus (page 14):

> "The only Federal question which was or "could be involved was whether a resolution "of the Board of Estimate and Apportionment "of the City of New York of May 11, 1906, was "*a law impairing the obligation of a contract* "and, therefore, repugnant to the Constitution "of the United States. Whether the resolution "of the common council of April 10, 1883, "created a contract or was merely a revocable "license was involved in the question."

To this should be added, that there was also involved the question, whether the decision of the Court of Appeals herein does not also run counter to §1 of the XIV Amendment of the Constitution of the United States and invoives *the taking of "property without due process of law."*

We have no quarrel with the assertion that mere repugnancy to the Constitution of the State of New York does not present a federal question.

It may be, in one view of the matter, highly important to note the difference between the State and Federal Constitutions.

The latter provides in Article I, §10, that, "No "State shall * * * pass any * * * law *im-* "*pairing the obligation of contracts.*"

The V Amendment (1790) provides that, "No "person shall * * * be deprived of life, liberty "or property without due process of law."

It has been held that this provision refers only to the National Government and, therefore, it can be eliminated from this discussion.

The XIV amendment, §1 (1860), provides that: "Nor shall any state deprive any person of life "liberty or property without due process of law."

The only provision applicable, in the New York Constitution is found in Article 1, §6 (1846), which provides, "No person shall * * * be deprived "of life, liberty or property without due process "of law."

There is no provision in the State constitution referring to the impairment of the obligation of contracts.

There is but one constitutional guarantee under the law of New York.

Returning to the contentions of the respondent's counsel at the foot of page 14 of his brief, we emphatically deny that "the plaintiff in error "argues only the question whether the resolution "of the common council of April 10, 1883, created "a valid contract, which could not be impaired by "the *State* law, or taken without due process of law." Without going further, it is only necessary to quote the propositions asserted on page 2 of our brief heretofore filed (to which we hereinafter refer as our main brief) wherein we state that the resolution of April, 1883, "Was and is a part of "relator's franchise, a contract and property; and "that the *obligation of the contract has been im-* "*paired by the State*, and the relator's property "taken without due process of law." The heading

of Point I (page 18) of our brief contains the same contention in almost the same words.

The words underlined (*supra*) are the words of the Constitution of the United States, and are found nowhere in the New York Constitution. It is this "impairment of the obligation of a contract," as well as the claimed deprivation "of property without due process of law," which Judge HAIGHT discusses in his opinion, especially where he cites and attempts to distinguish the *Dartmouth College* case (1819), which was decided solely under the provisions of Article I, Section 10, of the United States Constitution, which contains the only constitutional guarantee to which appeal could be, or was made in 1819.

So too, we contest the proposition of respondent's counsel that this federal question "was not "properly raised and decided, so as to present it "for consideration by this court," and we contend that it was not only decided but that its decision was "necessary to the disposition of the case." It was practically the sole reliance of the relator.

(I) THE TEST TO BE APPLIED IN DETERMINING WHETHER A FEDERAL QUESTION WAS RAISED OR DECIDED.

It is too late to question the following well established propositions:

(a) It is sufficient if it appears from the record "by clear and necessary intendment" that the federal question must have been passed upon.

Crowell vs. *Randell*, 10 Pet., 368, 398;
Furman vs. *Nichol*, 8 Wall., 44, 56;
Roby vs. *Colehour*, 146 U. S., 153.

(b) It is sufficient if it appears from the *opinion* of the state court that the federal question was passed upon, even though that does not appear elsewhere in the record.

Murdock vs. *City of Memphis,* 20 Wall., 590.
Gross vs. *U. S. Mortgage Co.,* 108 U. S., 477;
Philadelphia Fire Ass'n. vs. *New York,* 119 U. S., 110, 116;
Walter A. Wood Co. vs. *Skinner,* 139 U. S., 293;
Chambers vs. *B. & O. R. Co.,* 207 U. S., 142, 148.

(c) Any doubt may be resolved by a certificate of the State Court, signed by its presiding justice, or by the recitals in the remittitur.

If the rule has ever prevailed in this Court that it "will not look into the opinion" to ascertain whether the federal question was raised "but will dismiss the appeal," as is asserted by the respondent's counsel on page 15 of his brief (citing cases in 88, 98 and 116 U. S. reports) they have been overruled by subsequent cases, some of which have been cited *supra.*

Applying the above tests:

(a) Quite aside from the opinion, we maintain that the question was clearly and necessarily raised by the record. The principal affidavit, upon which the writ of mandamus was applied for, was made by the secretary of the relator and therein, at the very initiation of his recitation of the facts,

he asserts that he has been requested and proposes "to set forth the facts and produce some of the "documents which establish the validity and *the* "*irrevocability* of the company's charter and "franchises, including its right to maintain, oper- "ate and lease low tension conductors in the streets "of the City of New York and *its right to continue* "*to exercise all of its powers under its charter* EVEN "IF SUCH FRANCHISES AND POWERS WERE DISPUTED "BY THE CITY OR STATE" (fols. 44 and 45).

Manifestly, the only way of maintaining the irrevocability of the franchise as against the sovereign state was by reliance upon the Federal Constitution. Thus at the very initial step of the whole proceeding was an appeal to the constitutional guarantees contained in §10 of Article I of the Constitution of the United States, and in the XIV amendment.

The whole proceeding from the time that affidavit was filed to the rendition of the opinion in the Court of Appeals turned solely upon the proposition that the contract between the relator and the City was irrevocable, and could not be impaired, either by the City or by the sovereign power of the State itself, exercised either outside of, or attempted to be exercised within, the State Constitution. Thus we come within the rule that the federal question appears *from the record itself* to have been raised, *discussed and decided.*

This is a sufficient denial of, and answer to, the statement of respondent's counsel (who have argued this federal question in all the courts, in this proceeding) that "upon the record it appears "that the alleged repugnancy of the revoking reso-

"lution to the Constitution of the United States "was first raised in the assignments of errors in "the application for the writ of error to review the "judgment of the Court of Appeals."

It was first raised in the first affidavit filed.

It also makes wholly irrelevant his citations at the top of page 16 of his brief.

Thus in *Curran* vs. *The State of Arkansas*, 15 How., 302, 320, Mr. Justice CURTIS wrote as follows:

> "It is sufficient to give this court jurisdic-
> "tion under the 25th section of the Judiciary
> "Act, that it appears by the record that the
> "question, whether a law of a state impaired
> "the obligation of a contract, was necesarily
> "involved in the decision, and that such law
> "was held to be valid, and the decision made
> "against the plaintiff in error by reason of its
> "supposed validity. *Armstrong* vs. *Treasurer*
> "*of Athens County*, 16 Pet., 281; *Crowell* vs.
> "*Randell*, 10 Pet., 392; *McKenney* vs. *Carroll*,
> "12 Pet., 66."

(b) But if there can be any doubt about that, then it clearly appears from the opinion of the Court of Appeals that the question was raised.

We quite agree with the relator's counsel that it is "from the opinion as a whole and reasonably "considered" that we are to deduce what the Court "did or intended to do," but we wholly differ from him in asserting that what the Court did or intended to do "was to determine the scope and validity of "the resolution of revocation under the Constitution "and Laws under the State of New York, and not

"in reference to the laws or Constitution of the "United States."

It clearly appears that the learned Judge, who wrote the opinion for the Court of Appeals, very seriously considered the proposition upon which the relator mainly relied, to wit, that the attempted revocation of the relator's contract with the City was a prohibited *impairment of a contract contrary to the constitutional guaranty.* That guaranty, as we have pointed out, is contained only in the Federal Constitution and was passed upon and solely relied upon in the *Dartmouth College* case, discussed and attempted to be distinguished in the opinion (page 418 of record). Therein, the learned writer discusses the question of the absence of any "right of the legislature of the state" to take from a private corporation its vested property rights, and on the following page of the record, he refers to the protection granted to contracts "by the Constitution of the State or "the United States." Discussing the *Squire* case, he quotes from Judge ALLEN's opinion as follows:

> "Until such grant has been accepted and acted upon it is a mere revocable license and may be recalled at pleasure; but after it has been accepted and acted upon it becomes a contract within the meaning of the clause of the Constitution which secures the inviolability *of contracts* by declaring that *no State shall pass any laws impairing their obligation.*"

Thus he refers to "the Constitution" and quotes *verbatim* the words of the Federal Constitution.

Throughout his opinion this clause of the federal constitution is constantly in his mind.

(c.) The third proposition which we have stated above is scarcely applicable to this case; for Judge HAIGHT's opinion, as we read it, is clearly a discussion of the federal constitution and the contentions made by the relator in reference thereto.

Nevertheless if there is any uncertainty in the mind of the Court such as seems to exist in the mind of the counsel for the respondent, it is easily resolved by a certificate from the Court of Appeals by way of an amendment of the remittitur or otherwise.

We rely upon the record and its clear statement of the claim of the relator (fol. 45).

This claim of irrevocability and the dependence of the relator upon the powerlessness of the state itself to impair its contract, was made even before the revoking resolution was set up by the answering affidavits and before, therefore, it was called upon to plead the protection of the federal constitution.

We rely upon the pointed discussion of the federal constitutional guaranty prohibiting the impairment of the obligation of contracts in the opinion of the Court of Appeals.

We cannot believe that there exists the possibility of such a miscarriage of justice, as would result if, after litigating this question in the state courts upon this clause of the federal constitution for four years, this court should be obliged to dismiss the appeal on the ground that we had not so litigated it.

We believe we have thus answered every contention under "A" on pages 15 and 16 of the respondent's brief.

It remains to point out that the decision of this federal question, thus raised by the relator, and

considered and passed upon by the court of last resort in New York, was necessary to the determination of this case, contrary to the respondent's contention under "B" on page 16 of its brief.

II. THE CASE TURNED BELOW SOLELY UPON THE FEDERAL QUESTION AND WAS DECIDED ADVERSELY TO THE RELATOR.

We have no quarrel with the assertion that "if "two questions are decided and the non-federal "question is sufficient to support the judgment, "this court will not entertain the appeal."

The respondent asserts, under Point I of its brief (we claim wholly without warrant), that there are three non-federal questions passed upon by the Court of Appeals adversely to the relator which were determinative in the Court of Appeals of the relator's claims, to wit:

(a) "The writ was denied and the judgment af- "firmed primarily upon the ground that the right "granted to the relator, by the resolution of the "Board of Aldermen of 1883, was a right only to "build conduits under the street for the purpose "of placing therein electrical conductors; that the "Legislature, by the Subway Acts, annulled this "resolution granting the right to build under- "ground subways and that the relator 'has never "'been granted a franchise to occupy conduits' for "telephonic communications."

We do not so understand the opinion, but assuming that the judgment was affirmed upon that ground, as stated by relator's counsel, it remains that it is for this Court to determine for itself "as to the existence and meaning of the alleged "contract, in order to determine the question "whether the subsequent legislation has impaired

"the obligations thereof." Our quotation is from an opinion of Mr. Justice PECKHAM in *Capital City Light, etc., Co.* vs. *Tallahassee,* 186 U. S., 401, 406, a case frequently cited by the respondent.

To the same effect are: *Muhlker* vs. *N. Y. & H. R. R.* 197 U. S., 544, 570; *Sullivan* vs. *Texas,* 207 U. S., 416, 423; *Douglas* vs. *Kentucky,* 168 U. S., 488, 502.

It certainly is true that the rights of the relator cannot be taken away by the State of New York by a construction placed by any official or court of the state upon its franchise and contract with the City, which is contrary to the claim of the relator and contrary to the wording and clear meaning and purport of that contract as it may be construed by this Court. That it was wholly misconstrued by the Court of Appeals in the opinion rendered in this case and was correctly construed in accordance with the present contention of the relator by Judge CHASE in a previous opinion (188 N. Y., 531), is clearly shown in our review of Judge HAIGHT'S opinion on pages 35-37 herein.

(b) The second "non-federal question" claimed to have been "presented in the state court was "that of non-user and abandonment" (page 18 of respondent's brief).

This claim of the respondent is to be answered precisely as the previous one just considered; for the question is as to whether the rights of the relator have been impaired by an unwarranted construction of its contract, to wit, one which holds, that notwithstanding that it is "not forfeited by "any term of the agreement itself" (to quote the state court), yet all rights under it can be arbitrarily taken away, or forfeited, or otherwise lost,

if not exercised in some particular way, and within some definite or indefinite time. This comes within the rule of the cases cited on page 64 *supra*.

(c). The third non-federal question which respondent claims "was presented in the state court, "was, that the relator failed to establish that there "was an existing demand for the construction of "such conduits" as were asked for by it or that the occupation of such conduits "was reasonably "assured, or that the public interests required the "construction thereof" (page 18 of respondent's brief). But the very next paragraph of his brief shows the absurdity of any such contention; for that paragraph is a quotation from the laws of 1892, upon which he relies and it provides that no such permit shall be granted "*by said board*" unless if the application is for underground construction there is an existing demand, etc., nor unless the occupation of the subway or the conduits is "reasonably assured and the public interests require the construction thereof."

As we have shown heretofore and as the *Longacre* case held, there are two acts to be performed by any company like the relator before it can put its wires under the streets. The first is to have space assigned to it by the respondent and as a pre-requisite it must show that it has lawful authority to put wires under streets, etc. Then it must apply to the successor of the board referred to in the quoted statute of 1892, to wit, the Commissioner of Water Supply, Gas and Electricity. As a pre-requisite for the permit *from him*, if the application is for the construction of additional subways it must show that there is an existing demand, that the occupation of the conduits is rea-

sonably assured and that "the public interests *require the construction thereof.*"

Thus, it is seen, first, that these various matters must be shown not to the respondent but to the Commissioner of Water Supply, Gas and Electricity, who issues the permit as the successor of the board.

But more than that, none of them need be shown except in those cases where the applicant is asking for the *construction of additional subways or conduits,* as is expressly stated in the act which the respondent quotes.

In the present case the proof is to the effect that there are sufficient conduits to accommodate all the wires, which are the subject of the application which was denied by the respondent, and hence no such question arose.

If more is necessary to answer this contention it is found in the uncontracted evidence in the record that there was an existing demand and the public interests demanded new construction (fols. 50, 82, 320-321).

It is no answer to claim either on brief or in affidavit that the 105,000 contracts were only "applications" and not "contracts," for 105,000 "applications" (fols. 318, also pages 302, 304) are evidence of an "existing demand" even if they do not constitute contracts and even if some few of the applicants may have died or moved from former residences.

These contracts have been procured, and made, on the faith of the contract of the Lines Company with the City.

One hundred and five thousand subscribers (reckoning only five persons in a residence or an office)

represent *an insistent constituency of over half a million* people, all within the city. But beyond its boundaries and throughout the State and country are others, knocking at the city's doors—or, to use a more appropriate metaphor—seeking to ring the city up.

New York, unlike almost every other city in the country, is in the grip of a telephone monopoly (fols. 325, 326, 327), notwithstanding the precautionary anti-monopoly clauses inserted in the subway acts. The price of service exacted is in excess of that paid in any other city and very much higher than that paid in all cities where competition exists and than the prices to be charged by the Lines Company (fols. 321-324).

The beneficent effects of competition in the telephone field were discussed in *Central N. Y. Tel. & Tel. Co.* vs. *Averill*, 199 N. Y., 128.

That the Bell monopoly owns the Empire Co. is abundantly proved and is not denied (fols. 76 to 81).

This, however, is not the chief factor to be considered from the standpoint of the public interest and the public demand. It is asserted in the appellant's papers, and is not denied that the Bell Telephone monopoly has always refused to grant any connection with any independent company, either within or without the State of New York (fols. 325, 326).

This astounding situation prevents any city, town or village having an independent telephone system (i. e., independent of the Bell monopoly) from sending a single message from any of its subscribers into the metropolis of the nation, or from receiving any message from the city for transmission to its subscribers.

This, under modern conditions, is more intolerable than if the monopoly, thus established in a single city, was a telegraph, instead of a telephone monopoly.

Thus the "public demand" is not confined to the city, but extends to all users of independent telephones and all those who desire to use them in the State or nation.

The public demand is, obviously, for a company such as the Lines Company bound by contracts to render service to these outside independent companies; for *that is the only guarantee the public or the City can have against a monopoly being established by an affiliation or merger with the present monopoly.* This public demand from other cities is also evidenced by the Lines Company's contracts with other companies having large vested interests in numberless plants (fols. 50, 82, 320, 321, 340, 341). Several of them appeared before the Attorney-General in opposition to the attack made upon the Lines Company by the monopoly. It has contracts with the Great Eastern Company, within, and with others outside, of the City (fols. 317, 318).

It likewise appears that an independent telephone system in New York City, in addition to the increased opportunities for communication afforded to the residents of that city themselves, would also put them in telephone communication with 250,000 independent telephones in the State of N. Y. and with 2,500,000 such telephones in New Jersey, Pennsylvania and other nearby states (fols. 321, 322).

A telephone toll line has already been established between the independent systems connecting Buf-

falo with Peekskill and intermediate cities (fols. 322, 323). The growth of the independent system of late years is further outlined in Mr. Reynolds' affidavit, and establishes beyond peradventure, an insistent public demand.

It is also important to note that there is not the slightest intimation, either in the record or in the decision of the court, or in any opinion in the case that any such question as to the applicability of the Statute of 1892, arose in the state court.

Even if it did arise, or arises now, it could only be a question which would prevent the denial of the writ (assuming it was resolved in respondent's favor) *as to building of any additional subways* by the respondent for the use of the relator, and would not have affected at all the issuance of the writ compelling installation of wires in the existing conduits.

In addition to all this, everything that we have said *in re* the first and second alleged non-federal questions is applicable to this question; for the contention of the respondent's counsel is that the relator's franchise and the statute of 1892, which they claim modifies it, ought to be so construed as to compel the relator to show as a condition precedent to the exercise of rights under the franchise a certain state of facts, whereas, the relator claims first, that no such construction can be placed upon the contract or the statute, and, second, that the placing of such a construction upon either, or both, would impair the obligation of the contract or franchise. If the statute of 1892 places upon it any such obligation without its consent, then that statute is unconstitutional, whether it is attempted to be made a part of the contract or not.

It remains to consider the assertions contained in the fifth and concluding Point of the respondent's brief.

There, four so called non-federal questions are outlined, which are claimed to be questions upon which the court below might have decided the issues.

(1) This is identical with the third of the non-federal questions enumerated under Point I of this brief, which we have already discussed.

(2) "The relator is not the real party in interest."

This is a futile and puerile suggestion; for it is actually based wholly upon the proposition that the principal stockholder of the *New York Electric Lines Co.* is the Great Eastern Telephone Company, and, that it therefore, is the party in interest. Thus, this so-called issue is no issue at all, much less is it a matter which received any consideration whatever in any New York court in this proceeding or in any other (see pages 92-96 *infra*).

(3) "The application was not made in good faith."

This is based upon allegations which have absolutely no probative value and like (2) *supra* was not considered, as the opinions show, either by the Court of Appeals or by the lower courts.

(4) "The relator lost whatever right it had, if any, by *laches* and the statute of limitations."

Everything that we have said under (1), (2) and (3) *supra* under this point applies here.

IN GENERAL: If the contention of the respondent prevails, then any respondent may rob this court of its jurisdiction in any case, however important, by setting up some such vague indefinite claim as that the plaintiff is not the real party in interest, that he is guilty of *laches*, or that some alleged statute of limitations applies, or that the proceeding or suit is not brought in good faith, or perhaps that the relator or plaintiff is estopped by some alleged act of his own, or of some one else, or that there was a defect of parties defendant or plaintiff, even if the suggestion is so futile *as not to have received any attention at all from the state court*. Thus, the protection of this court under the provisions of the Constitution of the United States, would become worthless.

In the case at bar there was, and always has been, from the initiation of the case to the present time, a clear cut issue upon which the case was decided, to wit, was the relator a party to an irrevocable contract, the obligation of which cannot be impaired, and by which it acquired property, which cannot be taken away without due process of law under the constitutional guarantees; the first mentioned guarantee being based *solely* upon the Constitution of the United States and the latter upon the Constitution of the United States and the Constitution of the State of New York.

POINT B.

In reply to Point III of respondent's brief.

The relator accepted and acted upon its franchise.

There are several vital errors in the assertions of the respondent under this point of its brief.

The issue is not raised by the answering affidavits. Folios 374 and 377 are cited. These are from Mr. Cahill's affidavit, of which we treat elsewhere.

The respondent's counsel asserts at the foot of page 30 of his brief that when the state courts in the *Ellison* case, *held* that the Subway Acts "deprived the appellant of the right to build subways in "the City of New York, the question of any other right of the relator company under said ordinance" was "expressly reserved and not decided." This is true, as we have pointed out *supra* (page 18), but it is also true that this exercise of the police power was only justified because it left the fundamental powers of the company unimpaired—to wit, its right *to lay its wires in the streets* (see pages 19, 28 to 31 and 34 et seq. *supra*).

So, too, the respondent's counsel are wholly in error in asserting that it was *after* the resolution of attempted revocation that the relator applied for a permit to open the streets to build subways.

The chronology is as follows:

(a) Application to Commissioner of Water Supply, Gas and Electricity, December 8, 1905 (fol. 68).

(b) Resolution of revocation, May 11, 1906 (fols. 72-73).

(c) Notice of motion for writ of mandamus, May 18, 1906.

(d) Answering affidavits verified May 29, 1906, setting up the resolution of revocation (fol. 72). (See also HAIGHT'S, J., opinion).

But in the *Ellison* case, so little was thought of the matter, although duly raised, that it was wholly ignored, and if Judge CHASE'S opinion is read carefully it demonstrates that it could not have been thought to be, or held, effective under the construction which he gave to the relator's contract with the state and city.

In our main brief under paragraphs IV, V, VI and VII of the Statement of Facts (pages 6 to 8) is a brief outline of what was done by the relator.

The respondent does not, and cannot, attempt to dispute any of the facts set forth in the said paragraphs IV, V, and VI. Nothing more was required by the contract with, or grant from, or permission of, the city.

Every item which it was the duty of the relator to perform, was performed, and there is no attempted denial, except the absurd one that the map filed was not a *bona fide* map. See Point E, *infra*, and page 16 *supra*.

Under paragraph VII, page 7, there are other facts, briefly outlined, which were proved in the relator's affidavits supporting its application for the writ herein. But they were not necessary or essential: *e. g.*, that the relator at once began to spend money contributed on the faith of the franchise. Of this there is direct positive evidence, some of it from eye witnesses and large contributors, as is shown in that paragraph of our brief and the citations there contained.

"But," says the respondent in effect, "these ex-"penditures were not *in the streets* and they were "denied by the answering affidavits."

Taking up the last suggestion first. It is only true that some of the activities were denied, and these only by assertions of no probative force.[1] To deny that *all of* $400,000 was expended on the faith of the franchise and in preparation for the installation of wires raises no issue that is vital, whatever view is taken of the law. So, too, an attempt to show (however persuasively or vainly) that the relator has not paid *all* its taxes (respondent's brief, page 13), or that it did not have as many offices (page 5 *id.*) and as large a factory (page 5 *id.*), or that its seventeen patents were not as valuable as was claimed, and that while the relator had the equitable title to them, the legal title did not become vested until after the death of Shelbourne, are fruitless contentions; but are all seriously advanced by the respondent's counsel to support their desperate effort (not suggested in any of the opinions in this case) that there was an issue of fact involved which prevented the issue of a peremptory writ and called for an alternative writ.

Thus the contention that the acts of performance epitomized in paragraph VII of the statement of facts in our main brief are in any material matters denied, is an error of the respondent's counsel.

It remains to consider their other contention, to-wit: that none of these expenditures were made *in the streets*. It seems that they contend that if a telegraph company was granted the right to erect poles in a village street and the company thereupon spent money and labor in felling and bringing poles to the village for erection, it would be

remediless if the village rescinded the right to erect them.

That is not the law.

If any of the cases seem to hold to the contrary it will be found, even in those selected and quoted by the respondent (see page 32 of its brief) that the permission granted was exclusive. Applying this exception (if it be one) to the hypothetical telegraph case, all that it does is to give the village an escape from the intolerable position that it would be in, if it gave an *exclusive* license to erect poles and then found the licensee guilty of great delay and the village perforce without any means to secure telegraph facilities.

In a word, the utmost the Courts have ever done is to import into a contract granting an *exclusive* license an implied covenant that the licensee will act with reasonable dispatch; for it cannot be supposed that a municipality ever would say to a licensee, "if you never erect the poles which we "have given you the right to put in the streets, we "will forever forego the use of the telegraph in our city."

That is not the case at bar, although Judge HAIGHT's reference to the relator as one who could "hold up" the city seems to indicate that the state court did not see this distinction between the cases.

There is another vital omission in the reasoning of the respondent's counsel. They never seem to appreciate that the consideration which if paid makes an executory contract an executed one, may be a detriment to the promisee, as well as a benefit to the promisor. Expenditure of money in preparing materials to build a house may not benefit the owner who has secured a contractor to erect it;

but the consideration evidenced by the expenditure is certainly as valid a consideration as if it was a benefit to the owner as well as a detriment to the contractor. The application of this fundamental rule is obvious.

The principal case relied on by the defendant-in-error is *Capital City Light, etc., Co.* vs. *Tallahassee*, 186 U. S., 401. But there this Court held that the franchise did not become a contract until the erection of the lighting plant, because the ordinance granting the franchise expressly contained such a condition. Under the statutes of the State of Florida, the City had no power to grant the franchise such as was there involved except on such a condition (page 411).

Secondly, the company in that case claimed an *exclusive* right.

The grounds of public policy might well require a different rule in case of exclusive franchises, for unless such a franchise is used, the community might be left without the requisite facilities (see also our main brief, pages 47-48).

So, too, in *City Ry. Co.* vs. *Citizens St. Ry. Co.*, 166 U. S., 557, an *exclusive* franchise was claimed, and, it may be added, sustained by this Court.

In *St. Louis* vs. *Western Union Tel. Co.*, 148 U. S., 92, it appeared that the Western Union had erected poles and strung wires in the streets of the City of St. Louis. Thereafter an ordinance was passed, authorizing any telegraph company to erect poles in the streets on certain conditions, one of them being that it should file an agreement permitting the City to use the top cross-arm of all poles free of charge.

It did not appear that the company filed the agreement, or in any other manner indicated its

acceptance of the ordinance. This Court was consequently constrained to hold that the ordinance did not constitute a contract.

In the case at bar, however, the plaintiff-in-error filed a formal acceptance of the ordinance, in which it agreed to observe all the conditions of the grant, one of which was to pay 2% of its gross receipts into the City Treasury, if the City so elected.

We might refer the Court to an able intervening brief by Messrs. Neville Egleston and James C. Carter in the *Squire* case as a *quasi* authority. It was filed with this Court on behalf of the Bell interests, which intervened therein by permission of the Court. It contains an able presentation of the views for which we contend. It is the more interesting because, if true, all of Mr. Cahill's conclusions of law and many of his alleged statements of fact are negatived by its contents, although he was an officer (fol. 369) of the intervenor, the Metropolitan Telegraph and Telephone Company. The principal and the main point of the brief reads:

"I. The acts referred to (the telegraph acts un-
"der which the relator was incorporated) confer a
"permanent franchise which is in its nature prop-
"erty and as such is protected by the Federal Con-
"stitution."

II. The second point reviews all the cases cited to the contrary by the respondent in that case.

The third point reads:

"III. The reserved right to repeal or amend can-
"not affect such rights as are here under consid-
"eration."

The records of this Court will show that when this brief was filed, the Corporation Counsel withdrew his contention that the relator's franchise was revocable.

The interest the Bell Telephone Companies had in the matter arose, undoubtedly, from the fact that if the relator's franchise was revocable so was theirs (unless the provision that they were to pay nothing to the city under it, and the relator is bound to pay 2% of its gross receipts, makes a difference).

However that may be, the fact that, as the record shows, the Bell Company owns nearly all the stock of the respondent and is its largest customer or tenant (fols. 77 and 79) explains not only why Mr. Cahill is so agile an affiant and so able to turn a somersault for his employer and client, but also why the respondent is willing to use every means and go to any expense to keep a paying tenant out of its conduits. (See also list of the directors of the two companies, showing that they as well as the officers of both companies are practically the same, fol. 78).

The effort to continue a monopoly is too obvious to require comment (fol. 78).

So, too, the counsel for the city in the *Ellison* case stated that no one disputes the right of the relator to lay wires in subways (fol. 74).

POINT C.

In reply to Point II of respondent's brief.

The relator's franchise includes the right to lay wires in the streets for telephonic purposes, and to either use them or to lease them to others for such purposes.

See pages 29-30, 35-36, *supra*.

In fact, the essential purpose of its franchise from the city is that right.

Point II of the respondent's brief asserts that "this proceeding is solely to enable the relator to "promote a telephone business, which was beyond "the scope of the permission granted by the city."

Respondent then contends that the scope of what the respondent calls "the permission" granted by the city is not co-extensive with its certificate of incorporation. Manifestly not.

This secondary franchise is merely the permission to use the streets of the city for the purpose of laying wires therein or thereunder to be connected with instruments of telephonic and telegraphic communication, while the certificate of incorporation together with the Telegraph Act grants the additional power to do a telegraph or a telephonic business under certain limitations, as is recited in the certificate of incorporation and within a certain area therein defined.

The respondent further contends that on a prior occasion the relator was seeking the right to build subways; but it was wholly untrue that it was not also seeking the right to lay wires and to do a telephone and a telegraph business.

So we might continue a review of this point II of respondent's brief, showing its errors and half-truths by considering each sentence; but the better way is to, clearly, and once for all, remove the confusion that is found in the respondent's brief. That confusion is not absent from much of the argument and opinion during the last twenty years of this litigation; and all because three very distinct lines of the relator's business are not differentiated. They all of them are legitimate pursuits for companies which are incorporated under the New York Telegraph Acts, past and present.

(a) The first is the BUILDING OF CONDUITS. This is distinct from the laying of wires under the streets in conduits.

This distinction is recognized in all of the Subway Acts and Contracts. The Consolidated Telegraph and Electrical Subway Co. expressly agrees in its contracts of July 27, 1886, and April 7, 1887, to construct subways, and to rent the spaces therein to others having lawful authority, who shall place their wires in the conduits, and shall own them after they are so installed.

(b) The second is the business OF LAYING AND OWNING AND THEN LEASING OR USING WIRES for telegraphic and telephonic communication and perhaps for electric lighting and power.

Those owning such wires can manufacture electricity and pass it through them to points, or stations, where it can be utilized, either by themselves, or others, for power or light or communication.

(c) The business of INSTALLING, OPERATING, LEASING AND USING TELEGRAPHIC OR TELEPHONIC IN-

STRUMENTS connected with lines of wires, to near or distant points.

No secondary franchise is necessary to enable a corporation or an individual to do a telephone business (especially if the telephone business is not thrown open to the public); e. g., no secondary franchise would be necessary to allow a telephone company to install a hundred or more instruments and to lease the same, provided they were all within the confines of a single city block and no street was entered or crossed by the wires connecting them. It is only when an owner of such a system attempts to cross or enter a public street that a secondary franchise is required.

We find upon respondent's brief, and in the answering affidavits, a great abundance of assertion concerning the past purposes and future intentions of the relator. The assertions are made so strenuously as to make us believe that the respondent's counsel believes he is charging the relator with high crimes and misdemeanors. He asserts that at one time in the history of the relator company it proposed to do exclusively the first of the aforementioned kinds of business, which is the sole business of the respondent—a company which is organized under the same Telegraph Act as the relator.

A careful examination of the record and documents and even of other assertions in the answering affidavits shows that the relator always had not only the right (fols. 141-142, 172-173), but also the purpose and intention to exercise both of the first two above mentioned kinds of business, *i. e.*, the building of conduits, the placing of wires

therein and leasing them to others.

The Subway Acts of 1885 and 1886 and the decision of the New York Courts in the *Ellison* case have prevented, and do now prevent, the relator from engaging in the first described business—building conduits, and it has, therefore, abandoned it and acquiesced in the relinquishment of that right. But the continued purpose and intention of the relator is to do the second above described business, the owning and placing its wires in the streets of the city within the conduits of the respondent, and the issue now before this Court is whether it has lawful authority so to do from the City and the State. The issue is not as to what use the relator may place the wires after they have been laid in the streets. They certainly will never be used for an unlawful purpose. Whether the relator intends to use them for its own telephone or telegraphic system, or whether it proposes to rent them to others, or whether it proposes to do both, that they may use them for some unlawful purpose, is not a matter before the Court at this time. It clearly appears in the petition that if one course is unlawful it will pursue the other only (fols. 319-320).

It would appear that the instant these distinctions we have drawn are clearly understood the answering affidavits become wholly immaterial,—mere surplusage which raises no issue. That was the conclusion that the counsel for the relator reached when they refused to file any replying affidavits to the respondent's answering ones, when the matter came up at Special Term in this proceeding on the application for the writ.

The matter thus to be bodily thrown out of the answering affidavits includes the following pages of the record: 124-125, 129-144, 153-157, 209-306.

The above facts regarding the various rights of relator, under its charter and under the franchise from the city, further appear with clearness on pages 18-20, 29-30, *supra*, in our review of the decisions and elsewhere.

What we have said in the preceding point (B) emphasizes the right of the relator to change its mind, if we should adopt the theory of the respondent, that it has done so, except as above indicated.

A corporation may have power to do two or more kinds of business, and it does not abandon the right to do any of the others by confining its activities, at first, to the doing of one.

Another cause of offense, as appears from respondent's brief, is that the relator is proposing to lease, as well as to use, wires, and he contends that there is no authority in its charter, or in the act under which it was organized, to lease its wires to others. It so happens that in the opinion in the *Ellison* case, a similar mistake was made by the learned judge writing that opinion, although the question was not there involved, for, he says, "it will also be observed that the general language "of the relator's articles of incorporation relating "to the purpose of the incorporation conforms "with said statutes [to wit: the statutes authorizing the organization of telegraph companies], "except that such articles include the word 'leas-"'ing,' which word is not found in the statutes "then existing, except as appears in the amend-"ment of 1862"; whereas, the laws of 1870, chap. 568 (which was an act "In relation to Telegraph

Companies"), expressly provide for the leasing of wires by companies organized under the telegraph acts (see also page 39, *supra*).

The respondent's counsel have in the past argued that a clause in the preamble of this act seems to be confined to extending the connections of telegraph companies in this State to outside companies, and so it cannot be availed of by the relator, notwithstanding that both in its certificate of incorporation and in its franchise it is given power to lease its wires.

But what is claimed by the relator is the right to lay its wires in the conduits of the respondent; if thereafter it offends against any law to the damage of any individual or corporation, municipal or otherwise, it can be restrained from the performance of any such act whether it be the leasing of its wires or any other act.

In further answer, it is to be noted that it, at least, has the right, even under the respondent's contention, to lease wires for the purpose of making connections with other companies, telegraphic or telephonic, beyond the borders of the City of New York.

The Act of 1870 was repealed in 1890, because all of its provisions were re-enacted as Sec. 140 of the Transportation Law, *except the preamble*, so that the Legislature has withdrawn any limitation put upon it by the original preamble. This act is not referred to in the list of statutes in either of the briefs heretofore filed.

Finally, the only interest that the respondent here has in reference to the future conduct of the relator is that, having lawful authority to lay wires in the streets, it pay its rentals promptly, and in full, to the respondent.

It might as well refuse to receive the wires of the Western Union Telegraph Co., because it was fearful that it might lease some of them for illegal purposes, such as gambling or transmission of libellous matter.

POINT D.

IN REPLY TO POINT II OF RESPONDENT'S BRIEF.

By reversing its own construction of the relator's contract, the State of New York has impaired the obligation of the contract of the relator with the City and State.

See pages 28-39, *supra*.

If our previous contentions are even in part sustained it is unnecessary to refer to any other aspect of the relator's claim under Section 10 of Article I of the federal constitution, but the relator does rely and has heretofore relied upon the proposition that its contract with the State was construed by the Court of Appeals in the *Ellison* case, and the rights of the relator were then defined (see page 16 of main brief and the pages of this brief cited *supra*). In the words of this Court referring to another case, thus once interpreted "*that interpretation becomes a part* "*of the contract* upon which one acquiring land "(or a franchise) may rely and any subsequent "change of it to his injury impairs the obligation "of the contract." (The italics are ours.)

In subsequent litigation of that construction the Court of Appeals reversed its construction of the relator's contract or franchise to its injury and even to the extent of taking from it all of its rights under the contract thus reconstrued.

The words we have quoted above are taken from Justice Moody's opinion in *Sauer* vs. *City of New York*, 206 N. Y., 536, in commenting upon the case upon which we rely, *Muhlker* vs. *R. R.*, 197 U. S., 544. They were found by this Court to be applicable to the last mentioned case, but not applicable to the former, because of a different state of facts. This rule was also laid down in *Gelpcke* vs. *Dubuque*, 1 Wall., 175, and *Louisiana* vs. *Pillsbury*, 105 U. S., 278, 294.

The relator's counsel confidently contend that the case at bar presents a much stronger case than that involved in the *Muhlker* case, where the Court reversed a judgment of the Court of Appeals, for here both decisions were rendered in a proceeding in which the relator was a party.

If it be urged that the two decisions showing a change of construction by the Court of Appeals of the contract rights of abutting land owners in the *Muhlker* case were one of them before the plaintiff acquired his property and one of them later and in the case at bar we are relying upon two decisions, both of them subsequent to the granting of the franchise, we reply that:

(1) Such a distinction makes the case at bar the stronger and the impairment of the contract as injurious and reprehensible. Relying upon that construction, the relator abandoned its appeal to this Court from the *Ellison* case and expended

money and labor in preparation for the performance of telephone service, including securing 105,000 subscribers.

(2) There is no such distinction, for relator's reliance is not only upon the *Ellison* case and the contrary decision in the case at bar, but upon the many cases which, like those relied upon in the *Muhlker* case, long antedated the acceptance of the grant of the franchise by the relator.

POINT E.

In answer to Point IV of respondent's brief.

The relator completed its formal acceptance of its franchise from the city by duly filing the map which the ordinance called for.

See pages 16, 24-25, *supra*.

This map is described in the ordinance of 1878 (fol. 180), which is made a part of relator's secondary franchise by the ordinance of 1883 (fol. 173), and it provides that "Grantees under this "ordinance shall be required, within six months "after such permission shall be granted, to file with "the County Clerk maps, diagrams and tabular "statements, indicating the amount and position of "the spaces proposed to be occupied by them and "their rights, and privileges under this ordinance, "and shall be confined to the spaces, positions and "localities, as indicated by said maps, diagrams "and statements."

In passing, we may note that such parties as the relator are called "grantees" and not "licensees."

The map (Exhibit G) is not printed in the record, but is fully described on page 64 of the record, and conforms with the provisions of the ordinance. It is followed in folios 193 to 209, inclusive, with the tabular and other statements which the above quoted ordinance calls for, indicating the amount and position of the spaces proposed to be occupied, and this indication is in great detail.

RUGER, C. J., called attention to the fact that maps, plans and tabular statements as required by the ordinance had been filed (page 16, *supra*).

No objection has ever before been made to it, certainly so far as this record shows. In this connection we beg to refer to pages 24-25, *supra*, which throw light upon these contentions. See also page 7 of our main brief.

POINT F.

IN ANSWER TO POINT V (1).

The relator has wholly complied with chapter 263 of the Laws of 1892, and no issue of non-compliance has ever been raised, nor can it be.

See pages 9, et seq. and 33, *supra*.

On the respondent's brief, at page 55, we read: "that the laws of 1892 contain a provision that no "permit to open the streets for *underground con-* "*struction* was to be granted unless there is an "existing demand." (The italics are ours.)

We have already referred to this law of 1892 in another connection, on pages 9 *et seq.*, *supra*;

but this suggestion of the respondent's counsel of the applicability of the act to any such alleged issue, is a novel one. It refutes itself, for it will be noticed that the existing demand must only be proved in order to obtain the permit *from the city* to open the streets *for underground construction*, —that is, for the building of subways.

In other words, when there is no vacant space in the conduits, it may have to be proved in order to get the permission, which was the subject of the *Ellison* case. It is not needed, even upon such an application as was then made to the Commissioner of Water Supply, Gas and Electricity, except for actual construction, much less upon an application for space in the existing subways directed to respondent. In this connection, we may refer, to what we have pointed out, as having been decided on page 33 *supra*, especially the paragraphs in which we cite the *Long Acre* case and the *Squire* case as authorities.

But the proof is uncontradicted that there was an existing demand (see pages 66-69 *supra*, where under Point A this matter is discussed).

POINT G.

In answer to Point V (2).

The relator is the real party in interest.

See also Point K, *infra*.

On page 56 of respondent's brief we find it asserted that the relator is not the real party in interest.

It is asserted that this issue was raised by the answering affidavits at folios 389 and 392 of the record. Here we find Mr. Cahill swearing that The New York Electric Lines Co. has transferred its franchises to some other company, and, therefore, is not the real party in interest; but, under Point K, we show the utter falsity of any such contention. There, this matter is fully discussed. Narrowed down to its lowest terms, the contention for which the respondent stands is that because another company is the principal stockholder in the relator, therefore, it, and not the relator, is the real party in interest.

On the same theory the New York Telephone Company, practically the sole stockholder of the Empire City Subway Company, should be the respondent!

POINT H.

In answer to Point V (3).

The application for the writ was made in good faith.

The contrary of this assertion is found in respondent's brief on page 56.

The citation of the record there made is Mr. Cahill's affidavit, where there is no proof whatever of any fact leading to any such conclusion. The jurisdiction of this Court cannot be ousted by mere assertion on the part of one of the counsel of a respondent, even if sworn to, that the application for the writ in the state court was not made in good faith.

As part of proof of bad faith, Mr. Cahill points to the opinion of Judge CHASE to which we have referred under Point C, *supra*, as asserting that the relator, having no claim to *lease* conductors for telephone or telegraphic communications, *proposes to lease* them to a company, which, it is claimed by the counsel, has no authority to carry on the telegraphic or telephonic business in the City of New York; by which, we suppose, he means that it has no power to lay wires in the streets, or to build conduits in the streets, or to stretch wires in the streets. This is the only evidence in the record, which the respondent even claims, shows any bad faith on the part of the relator.

Comment is unnecessary.

But the plea of bad faith (if such a defense exists) is a plea going to the discretion of the Court, and in the case at bar the denial of the writ was not on the ground of discretion at all, as we have shown, but as a matter of law (fol. 17).

POINT J.

IN ANSWER TO POINT V (4).

The relator has lost no rights by any alleged laches.

See pages 4-45, *supra*, and Points A and B, *supra*.

The entire history of the relator, as contained in the statement of facts in our main brief and throughout this brief, especially the history of the litigation as set forth *supra* on pages 4 to 45, re-

futes any such contention as is made by the respondent.

But *laches* are not involved, for they are a matter of discretion, and the writ was denied expressly "as a matter of law and not in the exercise of "discretion." We also especially refer to pages 40-41 of our review of decisions and to much that is said under Points A and B, *supra,* in reference to the law of 1892.

POINT K.

IN ANSWER TO POINT V (5) OF RESPONDENT'S BRIEF:

No statute of limitations is involved herein.

See pages herein cited under the preceding point.

We especially refer to what we have said in Point B, *supra*, in reference to a possible distinction between the applicability of either the defense of *laches* or a statute of limitations, where the franchise granted is an exclusive one, which prevents the municipality using the streets itself or through grants to others in supplying necessities to the community.

No such question is here involved.

We do not believe that this contention is seriously suggested now. The opinion of the State Court shows that it was not considered.

POINT L.

IN ANSWER TO PAGES 8 TO 10 OF RESPONDENT'S BRIEF:

The relator has never assigned its franchise.

The respondent has in various portions of its brief, although not under a definite point, asserted that the relator has lost all its rights because it has assigned its franchise.

The facts upon which the respondent relied are nearly all of them contained in the Cahill affidavit, to which citations are made on page 8, 8a, 8b, 9 and 10 of respondent's brief. It is quite true that the secondary franchise expressly provides that "the said company shall not transfer or dispose "of the franchise hereby granted without the "further authority of the Common Council, and "that it will make no discrimination of individuals "or corporations in the rental and use of its lines "or wires which may be laid down hereunder."

There is no proof whatever that the relator, in leasing the use of its wires by others is to make any discrimination. The record is to the contrary. It must and proposes to treat The Great Eastern Company like every other (fols. 50, 51, 82, 83, 177). We do not understand that the respondent claims that there is any other purpose in the mind of the relator, than to treat all alike. If there is any such indication, it is a conclusion and not a statement of fact, and has no probative force. He points to no assignment, he alleges no transfer, but he claims that a certain financial plan, outlined by the Great

Eastern Company, in an endeavor to sell its stock to the public, indicates that a transfer of the franchise has been made or was contemplated.

We find, on the respondents' brief, on page 8a, immediately following a statement of this claim, clear indication that no such claim has ever been seriously considered, for, on that page the resolution of revocation, so-called, is recited in full. It was drawn by the City's counsel, in the then pending Ellison case, and drawn for the purpose of defeating the claims of relator. Therein are stated the reasons why the Board of Estimate and Apportionment proposes to rescind the franchise granted by the Board of Aldermen in 1883, and it is eloquent in the omission of any suggestion that the rights of the relator company have been transferred to any other Company. It asserts, on the contrary, that the relator was seeking "leave to open the "streets and construct subways and lay wires there-"in for the use of The Great Eastern Telephone "Co.," under the relator's alleged perpetual franchise.

But now comes the respondent, The Empire City Subway Company, resisting the introduction of a new tenant in its subways and asserts that the franchise has been asigned.

The financial plan, to which it refers and which it prints in its brief, on page 12 thereof, was a memorandum given out, not by the authority of The New York Electric Lines Co., but by D. A. Reynolds, president of The Great Eastern Telephone Co. and treasurer of The New York Electric Lines Co. But assuming that it has probative value, it proves quite the contrary of the strenuous contention of the respondent's counsel.

In the first column, it introduces us to The Great Eastern Telephone Co. of South Dakota as a "Holding or Pioneer Company," and in the second column, we learn that this Great Eastern Company "has acquired the ownership of The New York Electric Lines Co. owning the perpetual franchise for the old City of New York, covering telephone, telegraphic and electric illumination." What it clearly does *not* assert is just what the respondent says it does assert, to-wit, that it has acquired, by assignment or otherwise, any of the franchises of the relator.

This holding company has acquired also the "control of [evidently meaning that it has acquired a majority of the stock, in distinction to acquiring all of the stock] The New York and "Eastern Telegraphic and Telephone Co.," owning Brooklyn franchises. It further shows, that this holding company has secured from The New York Electric Lines Co. a perpetual lease of certain telephone rights and that the lease runs to a New York so-called "operating company" of the same name as the South Dakota corporation. This we learn in the fourth column.

We further learn that The New York Electric Lines Co. has, by no means, made any lease of any rights to The Great Eastern Company of New York, other than telephone rights.

At folio 858 of the respondent's answering affidavits is to be found Mr. Reynolds' explanation of this, where he states:

> "that we have the advantage of placing all of "the stock of the franchise companies [the

relator and The New York and Eastern Telephone and Telegraph Co.] in the treasury "of the Pioneer (elsewhere called the Hold-"ing Company), where it will remain intact "enabling us to develop the many rights under "the franchises by other operating com-"panies."

There is not one word indicating that any *exclusive* lease of its rights has been given to any company and the evidence is to the contrary, so that this financial plan, together with all of the evidence in the relator's affidavits and in the respondent's answering affidavits, conclusively shows that the relator has never lost and never intended to lose its identity and its ownership of all of its franchises, primary and secondary; that its stock is held by a holding company known as The Great Eastern Telephone Co. and that it has agreed to lease wires, which it may have the privilege of laying in the streets, to The Great Eastern Telephone Co. of New York, which has a right to do the telephone business, which offer to lease is not exclusive, but will be offered to others on the same terms.

Finally, if this lease to The Great Eastern Telephone Co. of New York is illegal, or if that company has no right to do a telephone business, or to lease wires for that purpose, that is a matter wholly apart from any issue in the present case.

For, as we have pointed out heretofore, and now reiterate, and insist upon, it does not stand in the mouth of the respondent to assert its fear that the relator, which has lawful power and authority to place its wires in the conduits of the respondent

upon paying the rental to the respondent therefor, may at some future time, even if in pursuance of a present intent, attempt to use the wires which it has authority to lay for improper purposes, or, allow their use by parties who are not by law permitted to use them.

POINT M.

In reply to the suggestions in respondent's brief, page 13, re payment by the relator of franchise and other taxes.

The relator has paid, and the city and state have accepted, the payment of taxes upon its franchise and other property. The moving papers show that the relator has paid all of its taxes. There is some denial that it has not paid some of them.

It also appears, that what is known as the Ford Franchise Act, was passed in New York in the year 1900. It imposes a tax upon the special franchises owned by public utility and other corporations.

After the levying of this tax and acceptance of payment thereunder, as well as exacting taxes on its other property, the city, as the agent of the State could not revoke the special franchise of the relator, for both it and the state were estopped by this act.

A State or a municipality can contract, can grant, can create obligations, can make conditions, and it can waive conditions, and this by acqui-

escence or by affirmative and express act. In this, States and municipalities do not differ.

(1) In 1907, the State also recognized the Lines Company as a valid corporation with its rights and franchises unimpaired by granting it an amended charter (Exhibit C, page 53).

(2) The *State*, after granting to the Lines Company the right to lay wires underground, under the provisions of the Act of 1881, appointed, by appropriate legislation, a commission, whose functions were to ascertain what corporations had valid taxable franchises and to levy a tax upon them (Ch. 712, Laws of 1899).

That commission from 1900 to a date subsequent to the attempted revocation in 1906, has acted as the agent of both the State and the city in levying, demanding, collecting and using the appellant's money as payment of the tax upon the special franchise which the State thus found and admitted that it possessed.

The learned opinion by Vann, J., and the opinion by Earl, R., in the *Franchise Tax Cases*, 174 N. Y., 417, *holds* that these special franchises are grants "*from the state or some municipal officer or body acting under its authority*" (page 435). There Vann, J., points out the powers and capacities of the State Tax Commissioners as compared with local tax assessors, and the necessity that the former should be possessed of special endowments to discern and value intangible property such as the special franchise of railroads, gas, *telegraph and telephone companies* (pages 439, 449). The constitutionality of the taxation of these franchises

(defined as "grants which usually contain contracts, executed by the municipality, but executory as to the owner," page 448), was sustained as a function of the State itself.

(2) In all the litigation including that in this court in the *Squire* case the city accepted the position that the relator was a corporation and had some rights in the streets, contending that the Subway Acts of 1884 and 1885 were constitutional because *they did not attempt to take away those rights*, but only to regulate them.

That the legal representative of a municipality or a State can by such acts bind the body which he represents, is well established.

In *Peck* vs. *Burr*, 10 N. Y., 294, as in the case at bar, the law officer (there the Attorney General, here the Corporation Counsel) by his act created the estoppel.

That a city can be estopped by its acts of recognition and acquiescence to deny the existence of a franchise in the streets, and that it may be done by accepting taxes is familiar law. *Los Angeles* vs. *Los Angeles W. W. Co.*, 177 U. S., 570, 576; *Atty. Gen'l* vs. *P. & R. R.*, 6 Iredell, 456; *Commercial E. L. & P. Co.* vs. *Tacoma*, 17 Wash., 670.

The last cited case is one an all fours with the case at bar.

See also *Rochester Water Co.* vs. *Rochester*, 176 N. Y., 36.

The following text books expound this view and give its limitations: 2 *Cooley on Taxation*, page 1521; 2 *Cook on Corp.*, Sec. 634; *Joyce on Electric Law*, Sec. 210; Angell & A. on Corp., Sects. 776-7; 803-6.

In *Bigelow on Estoppel*, Fourth Edition, page

660, the general rule is referred to, that the levying and enforcing payment of taxes by sale of property estops the municipality or state to dispute the title to the property, and several cases are cited in support of the proposition. Is there any difference between selling a franchise for taxes and taxing that franchise by a special, delegated Board? But if there is a difference, it so happens that in the case at bar the franchise of the company was advertised for sale by the State for non-payment of the franchise tax, the company refraining from paying until the Court had passed upon the constitutionality of the Ford Franchise Tax Act (fol. 86). See also *American Emigrant Co.* vs. *Iowa Land Co.*, 52 Iowa, 323; *Audubon Co.* vs. *American Emigrant Co.*, 40 Iowa, 460; *Simplot* vs. *Dubuque*, 49 Iowa, 630; *Adams Co.* vs. *B. & M. R. Co.*, 39 Iowa, 507; *Brandriff* vs. *Harrison*, 50 Iowa, 164.

If there was any forfeiture which the state, and the city as its agent, could waive, then we submit, they did so waive it by the performance and the non-performance of the acts we have referred to.

Respectfully submitted,

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April, 1914.

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IN THE

Supreme Court of the United States

October Term, 1912—No. 829.

October Term, 1913—No. 83

THE NEW YORK ELECTRIC LINES COMPANY,

Relator-Plaintiff-in-Error,

vs.

EMPIRE CITY SUBWAY COMPANY,

Respondent-Defendant-in-Error.

In error to the Supreme Court of the State of New York.

BRIEF OF PLAINTIFF-IN-ERROR UPON THE QUESTIONS RAISED BY THE STIPULATION RE AMENDED REMITTITUR HEREIN.

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April, 1914.

IN THE

Supreme Court of the United States

THE NEW YORK ELECTRIC LINES COMPANY, Relator-Plaintiff-in-Error, against EMPIRE CITY SUBWAY COMPANY, Respondent-Defendant-in-Error.	October Term, 1912—No. 829. October Term, 1913—No. 370.

In Error to the Supreme Court of the State of New York.

Brief of Plaintiff-in-Error Upon Questions Raised by the Stipulation re the Amended Remittitur Herein.

The counsel for the plaintiff-in-error having presented this case to the Court of Appeals and to the lower state courts, and having argued (as the opinion therein shows) that the relator was entitled to the protection of the clause in the federal constitution which prevents the impairment by any state

of the obligation of contracts, were surprised to find upon the respondent's brief herein, the assertion that that vital question was not shown, by the record, to have been before the state courts.

An examination of the record clearly shows that in the initial affidavit supporting the writ, the protection of the federal constitution was invoked; for the claim is there made that the franchise of the relator was irrevocable even by the state (fol. 45).

It is also clear from the whole opinion of Judge HAIGHT that the clause in reference to the impairment of the obligation of contracts, *which is contained only in the federal constitution,* and is not found in the New York State constitution, was ever before his mind, and that he overruled our contention concerning it and was obliged so to do before reaching the conclusion that the denial of the writ of mandamus "as a matter of law" should be affirmed.

So vital, however, are the issues here that to remove all doubt and out of excessive caution counsel for the relator applied to the Court of Appeals for a certificate, such as has been used in many cases in this court, where any question has arisen as to ambiguity in the record or the opinion, or in lieu thereof for the recall and amendment of the remittitur.

Concerning the usefulness of this procedure we refer to such cases as:

> *Murdock* vs. *Memphis,* 20 Wall, 590; *Illinois Central* vs. *McKendree,* 203 U. S. 514; *Rector* vs. *City Deposit Bank Co.,* 200 U. S. 405; and *Roby* vs. *Colehour,* 146 U. S., 153.

On Saturday, April 18th, 1914, an order to show cause was obtained from the Court of Appeals, why a certificate should not issue or the remittitur be returned to the Court of Appeals and amended. This was argued by counsel of the respective parties before that Court on Wednesday, April 22nd, 1914, and a decision was rendered thereon on Tuesday, April 28th, ordering an amendment of the remittitur by adding to it a certificate showing that the relator on the argument before that court submitted a point which is quoted in full and which evidences the relator's reliance upon the constitutional guaranties in question.

It was thereupon found practically impossible to secure the exchange of papers between the various courts affected,—the Court of Appeals in Albany, the Supreme Court in New York City and this Court in order to effect a formal physical change in the record before the appeal is reached for argument in this court.

Counsel for both the relator and the respondent, knowing the vital interests involved and in obedience to the importunity of the situation (the case being about to be reached for argument in this court), entered into a stipulation, which will be presented upon the argument and which speaks for itself.

Whatever other function the amendment of the remittitur, or the order directing the amendment, may serve, it will at least inform this Court as would a certificate that the federal constitutional question was raised and argued before the Court of Appeals.

The amendment to the remittitur recites in full as part of the record, Point XII upon the relator's

brief before the Court of Appeals. It certainly now makes that point a part of the record. Little need be said concerning it and its contents.

On its face it refers to points II, VI, VIII, IX, X, XI, which discuss the "constitutional guaranties" which are referred to in the heading, and hence it does not purport to contain all of the argument upon the constitutional question. These guaranties, as shown by the context, are the two contained in the federal constitution,—that providing against the impairment by any state of the obligation of contracts, and that contained in the XIV amendment which prohibits any state from taking property without due process of law,—and the provision identical with the latter in the New York constitution.

The New York constitution contains no provision regarding the impairment of the obligation of contracts. It contains but the one constitutional guarantee. Thus the use of the plural in the heading of the point necessarily refers to guaranties of the federal constitution as well as to the single guarantee of the state constitution.

This Point XII on its face is a condensed statement summing up the preceding points. There are but five cases cited in it.

The first is a New York case, which expressly refers not only to the taking of property, but to the impairment by a Common Council of a franchise by a "subsequent act of its own."

The second case is used and cited in reference to the constitutional guarantee respecting the due process of law; for it holds that a forfeiture must be enforced in the Courts, if at all.

The third case holds to the same effect, as shown by the quotation from it.

The fourth case cited is a case in this Court. It was used by the relator's counsel as illustrative of the proposition, to quote their own words upon the brief, that a grant of state lands by the legislature of a state "*constituted when accepted a contract within the protection of the federal constitution*," and that a second enactment attempting to annul it "being an impairment of the con-"tract, was void."

If the Court deems that there is before it by reason of the stipulation, the moving and answering affidavits on the order to show cause why the remittitur should not be amended, then we may consider the headings of the other points of the relator's brief in the Court if Appeals. They include the points referred to at the opening of Point XII. The headings show that any discussion under them almost necessarily involved the impairment of obligation of contracts clause of the federal constitution.

The affidavits also clearly evidence the fact that not only in Point XII of the brief, but in other points therein and in the argument contained in the intervening brief, the federal question was relied upon, and discussed.

We believe that all we have said upon our reply brief, concerning the clearness with which the federal question is raised in the record, and concerning the clearness with which Judge HAIGHT has passed adversely upon our contention in respect to the impairment of the relator's contract by the revoking resolution, needs nothing to support it, but

that if anything is needed, it is only to make more clear what may possibly seem slightly ambiguous, and that all doubt is removed by either a casual or a careful and critical reading of Point XII. The Court can consider the certificate evidencing the raising of that point, whether it is before the Court by way of being included in the amended remittitur or in the order directing that the remittitur shall be amended. That order is clearly in the nature of a certificate from the Court issuing it.

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Supreme Court of the United States

October Term, 1914.
No. 63.

THE NEW YORK ELECTRIC LINES COMPANY (Relator),
Plaintiff-in-Error,

against

EMPIRE CITY SUBWAY COMPANY (Respondent),
Defendant-in-Error.

Brief of Clifford L. Middleton as amicus curiae

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IN THE

Supreme Court of the United States

THE NEW YORK ELECTRIC LINES COMPANY, Plaintiff-in-Error, *against* THE EMPIRE CITY SUBWAY COMPANY, Defendant-in-Error.	October Term, 1914. No. 63.

BRIEF FOR CLIFFORD L. MIDDLETON,

A Taxpayer, Etc., as Amicus Curiae.

On October 19, 1914, on consent and motion duly made on affidavit, leave was granted to Alfred B. Cruikshank, of counsel for Clifford L. Middleton, of New York City, to file a brief as amicus curiae in the above-entitled cause.

GENERAL STATEMENT OF THE SUBJECT-MATTER.

Mr. Middleton's interest in the controversy. The above-named Clifford L. Middleton, a resident and taxpayer of the City and State of New York, and otherwise specially interested as hereinafter set forth, files this brief as *amicus curiae,* in pursuance of special leave granted him on motion, and respectfully suggests for the reasons hereinafter stated either that the final order appealed from should be affirmed on the merits or that the writ of error be dismissed on the ground that the City of New York is not a party to the proceeding. Mr. Middleton's special interest in this cause is derived from the fact that the decision in this case will probably affect seriously a

litigation elsewhere to which he is a party as such taxpayer. As such he is not absolutely entitled to be heard here; but the City of New York of which he is a taxpayer should be so heard before this cause is here decided in favor of plaintiff-in-error, and the City is not represented here. Mr. Middleton, however, in a sense, is peculiarly entitled to speak on its behalf as well as in his own. He is plaintiff in an action in equity of the kind known as a taxpayer's action, now and for some years past pending in the Supreme Court of New York against both the parties hereto, wherein he, Middleton, demands an injunction forbidding the Lines Company from attempting to do or have done the very thing which it originally sought in the proceeding below to procure by mandamus, namely, the laying of its wires in the streets of New York and in the conduits of the defendant-in-error, the Empire City Subway Company. That suit was brought under the New York statute permitting any taxpayer to bring a suit to enjoin an illegal act, whereby the property or money of the City of New York or other municipality is in danger of being wasted or misapplied. It has been up to this point fully sustained in the New York court and Mr. Middleton has in that action secured a temporary injunction forbidding the laying of said wires, and the trial of his case has been held by the New York courts to await the result in this Court. Some of the principal questions in that suit are identical with those presented on this appeal. He is therefore doubly interested in the proper disposition of this cause in this Court, namely, generally as a taxpayer of New York City, and specifically as plaintiff in that action, since any opinion on the merits delivered in this case will certainly be read by the New York court on the trial of his action and may be determinative of the result.

We respectfully urge in this brief not only that Mr. Middleton should be heard here as a taxpayer now and

heretofore specially appearing in the New York courts to litigate the questions here brought up for decision, and therefore specially interested in this case; but further that this cause cannot properly be determined in favor of plaintiff-in-error in the absence of the City of New York, which should be the principal party defendant here. First, because the City of New York is financially interested in the subways and conduits in question, which were constructed by the defendant-in-error, the Subway Company, under a contract with the City and by authority of statute, whereby was created such an arrangement that the City has a present interest in the management of the subways, and a reversionary interest in the subways themselves; second, because of its paramount interest in its own streets, the possession whereof is directly involved in this suit. But principally because this appeal is founded on an alleged contract between the plaintiff-in-error and the City of New York to which the defendant-in-error was not a party.

Why we are resisting the plaintiff-in-error here and in New York. We regard the mandamus proceeding here on review as an attempted franchise grab and stock jobbing speculation on the part of the plaintiff-in-error which should be defeated. Whether or not the New York Telephone Company at present operating in that City is or is not contributing its share to the City or State revenues is beside the question. That Company is apparently lawfully in the streets, having actually undertaken the telephone service a generation ago under different circumstances than those now existing and when possibly the whole telephone system was a doubtful experiment. At any rate, what was then done with that Company is not before us now. The question here is as to the claims of the New York Electric Lines Company, now for the first time demanding the legal right to occupy the streets of New York in defiance of the wishes and

policy of the civic authorities and of the courts of this State; and thus attempting to obtain for nothing a franchise worth millions and to burden the City with a great and unestimated expense. The claim of the Lines Company to a perpetual franchise to lay wires and conductors for telegraphic, telephone and lighting purposes in all the streets of New York is founded upon a strained interpretation of an obsolete resolution of the New York City Board of Aldermen, passed over twenty-seven years before it was ever attempted by anyone to enforce it for the purpose now before us. This claim we say is based upon a permit dated in 1883, which for twenty-seven years after its date no one attempted to enforce as a telephone franchise; and which whatever life it once had has been long since practically defunct and obsolete; which has been swept into limbo by the march of events; which has been virtually repealed by the State, which has been formally revoked by the City which created it, and condemned as ineffective by every court in the State of New York to which it has been presented. The avowed policy of the State and City of New York is to grant no such franchise as this, to limit them all to twenty-five years, and to require proper compensation from them all. This policy, it is proposed by the Lines Company to override and to obtain this valuable permanent franchise for nothing. For that purpose it asks this Court to overrule the Civic and Judicial authorities of New York as to the facts as well as to the law, and to breathe into this old aldermanic resolution of 1883 the life of a great franchise. The record shows (*Cahill*, fols. 413-423; *Jensen*, fol. 743) that the result of the granting of the application of the plaintiff-in-error would be, in case it carries out its advertised projects, the necessary duplication of the present system of subways at a cost of millions of dollars which would be eventually charged against the City of New York when it comes to take the subways over

under its agreement with the Empire Company. Should the Lines Company's enterprise fail the new conduits would be tenantless after five years, which is the time limit of the security required to be furnished. Such a result is not improbable as there is no demand for the construction of said subways. In fact this franchise, which the plaintiff-in-error expects to get for nothing, is worth millions to the City and could be sold for that sum.

Detailed Statement of the Facts in the Case.

Why we have prepared a detailed statement of fact. We think that the Court needs in this case most of all a full and detailed statement of the facts, including the history of the claimant, the New York Electric Lines Company; for these facts show that there is nothing for this Court to review, either under the "impairment of contracts" clause or the "due process" clause of the U. S. Constitution, and therefore no Federal question in the case. What has the State or City done here except to revoke an obsolete and defunct permit or license to open the streets to lay wires, granted the Lines Company twenty-three years before and never used for any purpose? This is far from an impairment of a contract. The Lines Company has not been deprived of any property by the City or State by the refusal to permit it to enter the Empire City conduits or subways or the streets of New York, because it never had a property right to enter them. Nor was the revocation of the permit a destruction of property rights. Tangible property of the Lines Company in use under this old permit there was none; and a mere unused street permit is not in the constitutional sense, property for twenty years and forevermore, so that nothing can be thereafter done in the streets lest it be impaired or destroyed.

Incorporation of the Lines Company, its Charter, Objects and Powers. The New York Electric Lines Company was incorporated October 14th, 1882; its certificate of incorporation is in the record (*Ex. B. 47*, fol. 141). This certificate states that the Company was incorporated under Chap. 265 of the Laws of 1848 of N. Y., entitled "An Act to provide for the incorporation and regulation of Telegraph Companies" (fol. 143). The corporation seems to have been organized without any real cash capital or valuable property of any kind. It probably was started in pursuance of a scheme of one Sidney F. Shelbourne, or Schoonmaker, the name he originally bore (fol. 933), and to whom was originally issued ninety-seven per cent of the Company's stock. Its capital was stated in the certificate as $5,000,000, though it is doubtful if any substantial payment was ever paid into the Company's coffers; Mr. Shelbourne obtaining at the outset 48,700 shares of stock in return for prospective patents, some of which the Company obtained in his lifetime, and some not till after his death, and none of which were of any commercial value. There has always been a question as to whether this Company was organized for an operating telephone, telegraph business or to build telephone wire conduits to be laid in the streets of New York. The Lines Company is now here claiming the right as a prospective operating telephone Company to place wires in the conduits of respondent, The Empire Subway Company; but for a long time after its organization it practically disclaimed any intention to operate a telephone business, but insisted upon and litigated its claim to lay down in the streets of New York telephone conduits in which wires could be placed by or for the use of other companies. The two claims are by no means identical, and some confusion is likely to arise on this subject in the

minds of readers of the record of this and prior controversies. This is the fourth or fifth effort which the Lines Company has made to establish a right to a franchise in the streets of New York under this same Aldermanic ordinance; and in all the previous controversies the courts were confronted with a claim on the part of the Company more or less exclusive, to occupy the said streets with electrical conduits, and although this claim was based upon what seemed to be a mere authority to lay and operate wires, the Company was in the attitude of disclaiming any intention to carry on a telegraph and telephonic business. Such indefiniteness or confusion therefore as may appear on this subject in the court decisions made prior to the present case is the fault of the inconsistent attitude of the Lines Company in this respect; it was trying to obtain permission to build conduits and subways under an ordinary charter to operate telegraphs and telephones. In order to clear up this part of the case it is well to refer to the language of the statute under which the defendant company was incorporated, to its certificate of incorporation, to the ordinance under which it claims the franchise, and to the circumstances surrounding the transaction. The Lines Company was incorporated under Chap. 471, Laws of 1853, amending the General Telegraph Act of New York, Chap. 265, Laws 1848. This act of 1853 provides in Sec. 1:

> "Any number of persons may associate for the "purpose of owning or constructing, using and "maintaining a line or lines of electric telegraph, "whether wholly within or partly beyond, the limits "of this State; or for the purpose of owning any "interest in any such line or lines of electric tele-"graph, or any grants therefor, upon such terms and "conditions, and subject to the liabilities prescribed "in the act passed April 12, 1848, entitled 'An Act "'to provide for the incorporation and regulation "of telegraph companies.'"

The act of 1853 further provides (Sec. 2):

> "Such association is authorized to erect and con-
> "struct from time to time, the necessary fixtures
> "for such lines of telegraph, upon, over or under
> "any of the public roads, streets and highways; and
> "through, across, or under any of the waters within
> "the limits of this State, subject to the restriction
> "in the said recited act contained; and also to erect
> "and construct such fixtures upon, through or over
> "any other land, subject to the right of the owner
> "or owners thereof to full compensation for the
> "same."

The restriction above referred to was contained in Section 5 of the Act of 1848 as follows:

> "provided the same shall not be so constructed as
> "to incommode the public use of said roads or high-
> "ways, or injuriously interrupt the navigation of
> "said waters."

It will be observed that none of these acts in terms authorized incorporation for "telephonic communication," as expressed in the certificate of incorporation of the Lines Company. In 1882 when the Lines Company was incorporated there was no statutory provision in terms authorizing the incorporation of telephone companies, but it is generally conceded that the General Telegraph Act of 1848 and the others above quoted may be applied to telephone companies, and such hs apparently been the practice in New York State. (See dictum in *Central N. Y. Tel. Co.* vs. *Averill,* 199 N. Y., 128-135.)

The essential part of the certificate of incorporation of the Lines Company (Rec., p. 47, fol. 141), reads as follows:

> "This is to certify that the undersigned have asso-
> "ciated for the purpose of owning, constructing,
> "using, maintaining *and leasing* lines of telegraph
> "wires or other electric conductors for telegraphic

"and telephonic communication and for electric il-
"lumination to be placed under the pavements of the
"streets, avenues and public highways of the Cities
"of New York and Brooklyn, in the State of New
"York, and under the sidewalks of the streets and
"avenues of the said Cities, and upon, over or under
"private lands in the said cities, within blocks of
"buildings erected or to be erected therein and for
"the purposes of owning franchises for laying and
"operating the said lines of electric conductors, and
"the purchasing, owning and disposing of such real
"estate within the said Cities, and such personal
"property as may from time to time be necessary
"and convenient to the building, using, maintaining
"and leasing the said lines of electric conductors,
"upon the terms and conditions and subject to the
"liabilities prescribed in the act of the legislature of
"the State of New York passed April 12th, 1848, en-
"titled 'An Act to provide for the incorporation, and
" 'regulation of telegraph Companies,' being Chap-
"ter 265 of the laws of 1848 and the several acts
"amendatory thereof and supplementary thereto and
"in pursuance of the objects declared under author-
"ity of the Act aforesaid, the undersigned hereby
"certify as follows"; &c.

The attention of the Court is called to the use of the words "*and leasing*" in the foregoing certificate as not designated and not contained in the Acts under which the Company was incorporated, and as tending to show the original intent of the Company to lease its wires to other companies.

Necessity of Aldermanic Permit to the New York Electric Lines Company to use the streets of New York. The mere incorporation of the Company did not at this time give the Lines Company a right to use the streets, but the consent of the Municipal authorities was absolutely necessary for that purpose under the statute then in force. Sec. 1, Chap. 397 of the Laws of 1879 entitled

"An Act to provide for the laying of telegraph wires underground", read as follows:

> "Any Company or Companies organized and incorporated under the laws of this State for the purpose of owning, constructing, using and maintaining a line or lines of electric telegraph within this State, or partly within and partly beyond the limits of this State, are hereby authorized from time to time to construct and lay lines of telegraph underground in any city, village or town within the limits of this State, subject to all the provisions of law in reference to such companies not inconsistent with this act; provided that such company shall before laying any such line in any city, village or town of this State first obtain from the common council of cities, the trustees of villages or the commissioners of highways of towns, permission to use the streets within such city, village or town for the purposes herein set forth."

This Act was amended by Chap. 483 of the Laws of 1881 by substituting the words, *"lines of electrical conductors underground"* for the words *"lines of telegraph underground."* Section 1 of that Act is as follows:

> "1. Any company or companies organized and incorporated under the laws of this state for the purpose of owning, constructing, using and maintaining a line or lines of electric telegraph within this state or partly within and partly beyond the limits of this state, are hereby authorized, from time to time, to construct and lay lines of electrical conductors underground in any city, village or town within the limits of this state, subject to all the provisions of law in reference to such companies not inconsistent with this act; provided that such company shall, before laying any such line in any city, village or town of this state, first obtain from the common council of cities, the trustees of villages, or the commissioners of highways of towns, permission to use the streets within such city, village or town for the purposes herein set forth."

This statute was in force at the time of the passage of the Aldermanic ordinance next referred to.

The Aldermanic Permit to the Lines Company, its Extent and Circumstances of Granting the Same. At the time the Lines Company was incorporated there were no telegraph or telephone conduits existing in the streets of New York; the wires were all carried on overhead poles, and an agitation was then being carried on for the purpose of having these wires placed underground, though no definite plan of that object had been formulated. At this time Mr. Shelbourne, the virtual proprietor of the Lines Company, apparently conceived the bold scheme of obtaining such a permit from the Board of Aldermen to lay such electrical conduits or subways in the streets of New York as would enable him or his company to get exclusive control of the underground wires and conductors soon thereafter to be placed in said streets of New York. It was probably then apparent that only one such system could be tolerated, and a virtual monopoly would be held by whoever was first on the ground, or rather, in this case, *in* the ground. The space in these subways could either be leased to electric light, telegraph and telephone companies for large rents, or they might be furnished by the Lines Company with wires to be similarly leased. The latter was apparently what was intended, and hence the insertion of the unusual word "leasing," in the certificate of incorporation of the Lines Company; and hence also the references to the leasing of wires in the permit itself. At this stage therefore upon the application of the New York Electric Lines Company to Board of Aldermen, the permit constituting the Lines Company's alleged franchise was granted April 10, 1883, in the shape of a resolution of that Board. (*See Record, p. 58, fol. 172.*) The first paragraph of this resolution contains the language which is the foundation

of the claim of the Lines Company in this proceeding and which is as follows:

> "RESOLVED, that permission be and hereby is "granted to the New York Electric Lines Company "to lay wires or other conductors of electricity in "and through the streets, avenues and highways of "New York City, and to make connections of such "wires or conductors underground by means of the "necessary vaults, test boxes, and distributing con- "duits and thence above ground with points of elec- "tric illuminations or telegraphic or telephonic sig- "nals in accordance with the provisions of an 'ordi- " 'nance to regulate the laying of subterranean tele- " 'graph wires and electric conductors in the streets " 'of the City', passed by the common council and "approved by the Mayor December 14, 1878."

It will be observed that this permit is not in terms to carry on a telephone or telegraph business, or to lay wires for that purpose. The language is peculiar, and in the light of the Company's course, it is clear that the permit was not intended by the Lines Company to be used as authority for establishing a telephone or telegraph business. The permit further states (fol. 177) that the Company shall "make no discrimination of individuals or corporations *in the rental* and use of its lines or wires, which may be laid down hereunder"; and further (fol. 178) that the City might require the Lines Company to pay "two per cent of its gross receipts derived *from the rental* of its wires under the franchise hereby granted."

Commenting on this, Judge Haight, of the New York Court of Appeals, says (201 N. Y., 329):

> "It will thus be observed that the main purpose of the relator's incorporation and of the permit granted by the city was to construct underground passages for the laying of wires or electrical conductors for the purpose of renting to persons or corporations having the power to conduct the business

of electric lighting, telegraphing or the maintaining of telephonic communication."

Failure of the Lines Company to Operate under the Permit. Beyond a formal acceptance of this permit the Lines Company did absolutely nothing which it was thereby permitted to do; and though the language of this permission seems to be limited to the laying of *wires and other conductors of electricity,* yet there is no doubt that Mr. Shelbourne, who really controlled the Company and was its first President, and the other officers thereof, claimed at this time and for the next twenty-three years, a right under this resolution, to place electric subways or conduits in the streets. They were trying to lay conduits in the streets under cover of a permit to lay wires. Nor is there any doubt that the object of Shelbourne and his associates in obtaining the passing of this ordinance was to take advantage of the existing condition of things in New York City, and to be the first to either establish a conduit system or to be on the ground with a franchise therefor, claimed to be exclusive and perpetual, and ready to sell out to whoever should desire to undertake the inevitable establishment of such a system; which franchise might prove a fortune to those who could first get possession of the streets for that purpose. From that time on, as long as Mr. Shelbourne lived, he, and after him, his successors in the management of the Lines Company, disclaimed at every opportunity their purpose of actually operating telephone or telegraph business in the City of New York, and insisted that their sole purpose was to place conduits in the streets, and incidentally, possibly to lease wires therein to operating telephone concerns. It was to enforce this claim to the right to build conduits that the Lines Company came to this Court in 1892 in the Squire mandamus case (145 U. S., 175). The scheme was then, to establish the claim that this Aldermanic permit to lay wires constituted a franchise, and as

a part thereof, included the right to lay conduits; which if possible was to be made an exclusive right.

And therefore no effort was made by the Lines Company at or about that time, or at any time thereafter, to prepare for, or establish any telephone business; there is no pretense that they had any telephone subscribers, or attempted to get any; or that they ever hired an office or a telephone operator, or superintendent, or any person with a knowledge of the business, or that they ever established a switchboard, small or great; nor did they ever, from that day to this, lay a yard of wire in any street in the City of New York, or elsewhere, as far as is known. Nor had the Lines Company the capital, or any substantial part thereof, necessary for such an enterprise. In this very proceeding, and in prior controversies, this point has been raised, and the representatives of the Lines Company and their counsel have been challenged to produce whatever evidence they have that the Company ever transacted any substantial business. The answer of the Lines Company to this challenge appears in this record in the shape of statements direct and on hearsay, that it or others in its behalf raised some money with which to make experiments in the manufacture of conduits and wires suitable for underground operations and with which to conduct litigations, but nothing more. There is no pretense that Mr. Shelbourne or any of the incorporators of this company were men of means; nor is a single name mentioned of a man of business standing who was ever a stockholder of the Company. Nor is there anywhere a Treasurer's report ~~of~~ other plain statement that any substantial sum was ever paid into the company's treasury, in exchange for stock. On the contrary in its franchise reports "it is stated that the capital stock of said New York Electric Lines Company is $5,000,000, consisting of 50,000 shares of the par value of $100 each, and that said capital stock was issued for and

in consideration of United States patents which had or were about to expire" (fol. 1152). In a word this enterprise in 1883 was and remains one of that numerous class of financial adventures which are constantly springing up in the great cities, and are undertaken by men of optimistic temperaments, who usually have nothing to risk and therefore nothing to lose.

Unfair Attempt to Preempt all the City Streets. Failure of Lines Company to File a Proper Map as Required by the ~~Present~~ Former Ordinance. The ordinance of 1883 referred to and required compliance with a prior ordinance of December 14, 1878; and this latter ordinance provided (*Record*, p. 63, fol. 188),

> "grantees under this ordinance shall be required "within six months after such permission shall "be granted, to file with the County Clerk, maps, "diagrams and tabular statements indicating the "amount and position of the spaces proposed to "be occupied by them; and their rights and privi- "leges upon this ordinance shall be confined to the "spaces, positions and localities as indicated by said "maps, diagrams and statements."

This map was to be filed with the County Clerk as above stated, and a pretense of filing such a map was in fact made. It is to be distinguished from the map afterwards required to be filed with the Board of Commissioners of Electrical Subways, subsequently created under the Act of 1885 under which the subway system was established, which latter map never was filed by the Lines Company, or attempted to be filed, and the legal result and effect of which failure is hereafter more fully discussed. The ordinance of 1878, however, required the filing of this map with the County Clerk with the evident purpose of informing the Municipal authorities of what streets and spaces therein were to be actually occupied by the grantee under the ordinance. Instead of complying with this reasonable regulation, the Lines Company

filed in the County Clerk's office, a map of the City of New York, with every street and highway thereon designated as to be occupied by tracing lines thereon. This extraordinary piece of audacity appears in the statement attached to the map itself and filed therewith by the Company, as follows (*Record*, p. 65, fol. 195),

> "that is to say, the map herewith indicates the "streets of the city in which the said company desig- "nated its spaces to be reserved for the use of its "lines of wires and other electric conductors, *being* "*all the streets, avenues and highways of the city*, "the said streets, avenues and highways, whether as "yet open to the public or not, and being a space of "two feet wide by two feet in depth as provided in "the said General Ordinance."

As stated in the affidavit of Mr. Cahill (*Record*, p. 152, fol. 456), it did nothing more than make and file that map, attempting to preempt in a wholesale way every street in the City, and did not lay out a comprehensive or other system of conduits except by tracing lines as above stated on a map of the City and filing it in the County Clerk's office.

The Neglect or Delay of the Lines Company to Operate under its Permit was Altogether Unreasonable, and the Effect Thereof was to Terminate and Extinguish the Same. Thus the New York Electric Lines Company obtained in this easy way, what it now claims to have been an irrevocable contract with the City of New York, not to be impaired or interfered with by anything that the State might thereafter do; the privileges whereof granted thereby to the Lines Company should remain in effect for its benefit forever without necessity of anything being substantially done on its part. One would suppose that a reasonable interpretation of this alleged contract would require the Lines Company to begin actual operations in serving the City, or at least in laying down

wires for that purpose within a few months after the contract was made. This is especially so in view of the State statute then in force, which provided for the actual extinction of any corporation which did not begin operations within a year. The language of that provision is as follows:

> "If any corporation hereafter created by the Leg-
> "islature shall not organize and commence the trans-
> "action of its business within one year from the date
> "of its incorporation, its corporate powers shall
> "cease." (1 N. Y. R. S., 600, Sec. 7.)

We think we are justified in assuming that when the Aldermanic permit was given in April, 1883, the authorities of the City had a right to suppose and must have supposed that the Lines Company was ready to begin forthwith or with reasonable diligence practical operations under its franchise. The ordinance nowhere states that the Lines Company was to be given time to make experiments or to learn the telephone or telegraph business; yet the facts show that at that time it had neither business offices, operators, credit nor capital; that it had no wires suitable to lay in the streets and did not know how to get them or to make them; that it had no proper switchboard apparatus with which to operate telephones; that it was unable to operate telephones with the means at its command; that it considered it unprofitable to undertake such operations without certain patent rights or licenses, which it could not control, and made no effort to obtain; that it made no effort whatever to supply these obvious defects and necessities, and that it had not the least idea of entering the telephone field as an operator at any time nor even of laying down conduits until its experiments resulted successfully. And in fact from the date of the permit, April, 1883, to June, 1885, when the Subway Act was passed, during which time there was nothing apparently to prevent it from at least attempt-

ing telephone and conduit construction, it did nothing whatever beyond making some experiments in the workshop and applying for patents which were never used by anybody.

But the Lines Company seems to have supposed that once the resolution of the Board of Aldermen had passed, a paper acceptance returned by the Lines Company, a map of the City of New York filed in the County Clerk's office with marks on all the streets, and a statement attached thereto stating that the Lines Company claimed a property right in every street of the city, it need do nothing more, because it had thereby obtained a vested interest in every one of the said streets from which it could not be dislodged. So that thus, by the mere passage of a resolution obviously never intended to have such an effect, and without any substantial payment or expenditure it claimed and has ever since been claiming as its own, property street rights which were certainly even at that time valuable and which might ultimately become worth millions. Had such been the known effect of this resolution at the time it was passed, it is safe to say that it would have created a public scandal. But nothing was then publicly known of the Lines Company, which relying on this remarkable interpretation of its rights under the ordinance of 1883, refrained from doing anything whatever towards any practical acceptance of its alleged franchise during the whole of the remainder of 1883, 1884 and 1885. In neither of those years did the Lines Company take one practical step toward supplying the city, or any part of it, with telegraph or telephone communication, nor is it pretended that it did so. Its theory apparently was and is, that having obtained this permit it might then quietly proceed at its leisure with its process of experimentation in order to ascertain whether or not it could profitably do anything in the direction of placing electrical conduits in the streets. If

the experiments were unsuccessful it might abandon the project and file away its paper franchise until such times as the researches of others or a changed situation might make it appear to its advantage to try once more what might be done to make the franchise profitable. In the meantime the City was assumed to be tied hand and foot and compelled to await the pleasure of this paper company.

We cannot too strongly emphasize the fact that during all this time the New York Electric Lines Company had no intention nor desire to establish itself as an operating telegraph or telephone company in the City of New York, nor to conduct a telegraph or telephone business therein. Its present offer to do so is an afterthought not conceived until after the year 1907, when by the decision in the *Ellison* case in the Court of Appeals, it became clear that it could not get into the streets of New York as a conduit builder.

For the first twenty-four years of its nominal existence (for actual corporate life it had none), it made no claim or pretence whatever of a desire or intention to become an operating telephone or telegraph company.

Nor, did it in 1883, when it got this franchise, nor afterwards in good faith enter the field as a conduit builder. Counsel for the Lines Company now attempts to excuse its delay in using the Aldermanic permit by saying that the company mistook its course; that it applied to the wrong officer for a working permit; that it was misled as to its rights to build the subways, and on this excuse for non-performance it now claims by mandamus the reward of actual performance. But even that poor excuse is not well founded. The Lines Company never applied to any officer whatever for a working permit until 1886, three years after it received the Aldermanic permit, and for that period of three years it did nothing and offered to do nothing for the City of

New York, either in the erection of telephone lines or subway building, or anything else under its permit, or otherwise. Now, in any case the people of New York were entitled to have the alleged franchise either speedily used or abandoned. The occasion required diligence. The overhead wires in the City were a danger and a nuisance. In 1884, the Legislature passed an act requiring that all overhead wires in the City of New York should be put underground (L. 1884, Chap. 534), and in 1885 means were provided for enforcing that law by the creation of a commission for that purpose (L. 1885, Chap. 499). Meantime the Lines Company did nothing whatever and offered to do nothing whatever in the doing of the work for which it was created, and contented itself with futile and experimental fussing in some obscure workshop.

And so the years passed without anything being done by the Lines Company towards furnishing the citizens of New York with telephone or telegraph facilities, or any effort in that direction beyond possible presentations by its President Shelbourne to certain public officials of its preposterous claim under this permit to an exclusive right to occupy all the streets of New York with Shelbourne's own subway devices whenever they could be perfected to suit his ideas.

The Activities of the Lines Company, Futile as they were, Continued for over Twenty Years to be Used Solely in the Direction of a Subway Enterprise. In September, 1886, three years and five months after the passage of the Aldermanic permit and the perfection of the electrical subway scheme which was adopted by the authorities of the State and City of New York in July, 1886, the Lines Company began the proceeding which eventually reached this Court, known as the *Squire* case, which was a mandamus proceeding against Mr. Squire, the Commissioner of Public Works of the City of New York, to compel him

to allow that Company to enter the streets and to construct its own conduits and lay wires and conductors therein in its own way in defiance of the statutes of the State and in violation of every principle of civic street management. This was the beginning of litigation by the plaintiff-in-error against the New York City officials which continued in one form or the other from 1886 until May, 1907, when the *Ellison* case was finally decided in the Court of Appeals against the Lines Company. These litigations were inaugurated and carried on to establish this absurd claim of the Lines Company to build and operate without legislative or municipal oversight or control subways and conduits in which not merely its own wires and conductors but those of every company in New York were to be laid and maintained, and to take and occupy the City's streets for that purpose at its pleasure. When in 1907 this contention of the Lines Company had been finally decided against it, twice in the New York Court of Appeals and once in the United States Supreme Court, it then at last reluctantly abandoned that theory and began for the first time to entertain the idea of itself laying wires in the City subways. And so in June, 1907, it made an abortive attempt in that direction which was immediately abandoned, however, and nothing further done until June, 1910, when it made the application for space to the Empire City Subway Company upon the refusal whereof this present proceeding was initiated.

References to the record will satisfy anyone that the above history of the activities of the Lines Company from the date of its permit in 1883 to the beginning of this proceeding in 1910 is correct and fair; and that history indicates that while the permit does, as the Lines Company claims, in terms grant permission "to lay wires or other conductors of electricity in and through the streets and avenues and highways of New York" etc., as the main purpose thereof, it was not then so inter-

preted by the Lines Company. It shows not only that the Lines Company did not intend at any time between 1883 and 1907 to lay any such wires or conductors except as incidental to its scheme of subway building, and unless and until it was able to get possession of the streets for the purpose of building subways; but that it totally neglected to avail itself of whatever rights it had even in the direction of subway building until nearly four years after its incorporation. Not until the City under the mandate of the State in the exercise of its police powers had taken the entire business of the electrical subway construction in the City of New York into its own hands; not until the State of New York had provided for a unified system of electrical conduits to be constructed and operated under the supervision of commissioners when, of course, it was too late for the Lines Company or anyone else to attempt to build private subways, did the Company offer to do anything whatever with the City permit granted it over three years before; and even then its efforts were not in the direction of telephone construction or operating, but merely to obstruct by unfounded litigation whatever was being done by the authorities to give the City of New York a safe telephone and telegraph service.

The New York Electrical Subway Legislation. Meantime the New York legislature enacted two statutes which resulted in the present Electrical Subway System. The first was Chapter 534 of the Laws of 1884, which read as follows:

> "Section 1. All telegraph, telephonic and electric light wires and cables used in any incorporated city of this state, having a population of five hundred thousand or over, shall hereafter be placed under the surface of the streets, lanes and avenues of said city.
>
> §2. Every corporation, association or person owning or controlling telegraph, telephonic, electric or

other wires and cables, including what is known as telegraph poles, and other appurtenances thereto, shall, before the first day of November, eighteen hundred and eighty-five, have the same removed from the surface of all streets or avenues in every such city of this state.

§3. In case the owners of the property above enumerated shall fail to comply with the provisions of this act within the time herein specified and limited, the 'local governments' of the said cities of this state shall then, and they are hereby directed to, remove, without further delay, all telegraph, electric light and such other wires, cables and poles, wherever found above ground, within the corporate limits of their respective cities.

§4. No city in this state shall grant any exclusive privilege or franchise under this act to any corporation or individual by which a monopoly may be created or competition prevented on equal terms.

§5. This act shall take effect immediately."

On June 13th, 1885, the legislature passed Chapter 499 of the Laws of 1885, which provided for the creation of a board of commissioners of electrical subways of the City of New York to be charged with the responsibility of enforcing the provisions of the above Act of 1884 and declared (Sec. 4),

"provided no suitable plan is proposed or in use, "within sixty days after the passage of this act, it "shall be the duty of such board to cause to be de- "vised and made ready for use such a general plan as "will meet the requirements of said act, and of this "act, and the board shall have full authority to com- "pel all companies operating electric wires to use "such subway so prepared in accordance with the "provisions of this act."

Operating Companies Required to File Preliminary Maps as Part of the Electrical Subway Scheme. The Act also provided evidently in aid of said general plan as follows:

"§3. When any company, *operating or intending* "*to operate* electrical conductors in any such city,

"shall desire or be required to place its conductors "or any of them underground in any of the streets, "avenues or other highway of any such city, and for "that purpose to remove the same from the sur- "face thereof, and shall have been duly authorized "to do so, *it shall be obligatory upon such company "to file with said board of commissioners a map or "maps, made to scale*, showing the streets, or ave- "nues or other highways which are desired to be "used for such purpose, and giving the general loca- "tion, dimensions and course of the underground "conduits desired to be constructed. Before any "such conduits shall be constructed, it shall be nec- "essary to obtain the approval by said board of "said plan of construction so proposed by such com- "pany; and said board has and shall have power "to require that the work of removal and of con- "structing every such system of underground con- "ductors shall be done according to such plan so "approved, subject at all times to such modifica- "tions as shall from time to time by the board be "made, and subject also to the rules and regula- "tions, not inconsistent herewith, prescribed or to "be prescribed by the local authorities having con- "trol of such streets, avenues or other highways of "such city."

Necessity of Such Maps as Preliminary to Subway Construction. The Board of Commissioners of Electrical Subways thus provided for, was immediately created and organized and proceeded forthwith to establish a general system of elecetrical subways, for the City of New York; being the system still in force at this time. First a corporation was created known as the Consolidated Telegraph and Electrical Subway Company, and subsequently was also created the defendant-in-error, the Empire City Subway Company, which both duly built and operated their subways under contracts with the City approved by the Legislature, by which civic supervision and control thereof was provided and financial and reversionary interests therein on behalf of the City were created. The Court's attention is called to the fact that this legislative

scheme was for one general system of street subways for electrical purposes, and included the obvious requirement set forth in Section 3 of the Act of 1885 that all companies desiring to use said subways should furnish the Commissioners having the establishment of such subways in charge, with a map or maps made to scale, showing the streets desired to be used by the operating company, with the general location, dimensions and course of the underground conduits desired to be constructed. Without such information being furnished in advance by the companies intending to lay wires, it is clear that no practicable system of subways could have been established by the Commissioners. The Legislature was therefore justified as a police regulation, in requiring the filing of such maps within a reasonable time as a condition precedent to the use of the subways by any private company.

Failure of the Lines Company to comply with the subway statutes. As the Lines Company never filed any such map, and persistently refused during the whole period of subway construction to comply with the statute or to acknowledge its validity; the authorities were not only justified in considering that it had finally abandoned any claim it had to street use, but they were in duty bound so to do in the interests of the success of the subway scheme committed to their charge.

The Lines Company never filed any map or plans for approval with the Board of Electrical Subway Commissioners, as required by Statute, and by the obvious necessities of the case. No such map appears in the record. Mr. Cahill says:

> "No maps were ever filed by the Company with "the Board of Commissioners of Electrical Sub- "ways, nor was any application to the said Board "ever made by the company for approval of its

"plans, for permission to lay conduits, or to open
"the streets, or for any other purpose whatever."
(*Aff. Cahill,* fol. 457.)

The New York Courts found that there was no such approval of plans (115 N. Y. App. Div., 258, 261). There is no record of any having been submitted and no pretense that any such were ever filed (107 N. Y., 599).

This subway statute was before the Courts in the case of *People ex rel. New York Electric Lines Company* vs. *Squire, as Commissioner of Public Works of New York,* 107 N. Y., 593; 145 U. S., 175 (decided May 2nd, 1892), where its constitutionality was sustained as an exercise of the general police powers of the state.

References to this Record Showing that for ~~Fourteen~~ Twenty-four Years After its Organization the Lines Company's Work was Confined to Experiments Looking to Conduit Building. The plaintiff-in-error asks this Court to find from this record that there was an executed contract between it and the City of New York under its license to lay telephone wires in the City streets. But, on the contrary, the following and other references to the record establish two propositions of fact, namely:

1. That during all the time from 1883 to 1907 the only activities of the Lines Company were in the direction of experimentation and litigation; and

2. That all those activities were directed toward a scheme for building conduits which has been stamped as illegal by this Court and the courts of New York State. During all that period of twenty-four years the Lines Company persistently and deliberately remained outside of and hostile to the General Electric Subway system as established by law and insisted on building its own subways in the hope of establishing a virtual monopoly not only of electrical subways but of the wires in the subways.

We will here present to the Court substantially all the proof of the plaintiff-in-error on this important point of what its work actually was in those years.

The principal affidavit on the application below was made by *Wayne W. Wilson,* Secretary of the New York Electric Lines Company. He there states (fol. 46):

> "The history of the company is briefly as follows":
>
> "9. In October, 1882, the company was organized and at once actively began business.
>
> The art of placing electric wires underground for electrical purposes was then in its infancy, and was not understood. The electrical insulation of wires, as well as their proper protection from moisture and other elements was in its experimental stage. The company at once began the prosecution of its business in several different directions."

The affiant then states (fols. 47-50) that what it then did was to secure inventions and patents, obtain a franchise and begin the business of manufacturing and testing wires, conduits and other devices and appliances; that

> "This part of its business included experiments *which, at first, were not wholly successful,* but which were brought to such a point as to be entirely practicable in 1885 or 1886;"

and that it filed a map in the County Clerk's office and carried on litigation. It further refers to its recent arrangements with the Great Eastern Telephone Company (fol. 50), which are not relevant on this point.

These experiments were all evidently and concededly in the question of subway work; no inventions or experiments were necessary as a preliminary to the use of the City's subways.

Another affidavit is that of *Charles J. Warren,* former President of the Lines Company (*Record,* fols. 285-295). Referring to the Company's beginning he says (fol. 288):

> "At that time the art of placing electric wires

> underground for electric purposes, was in its infancy and was not understood, and the insulation of wires as well as their proper protection from moisture and other elements was in its experimental stage. * * * In the course of said proceedings many experts of high standing testified that *even at that time there were grave difficulties, some of them practically insurmountable* and requiring a further development of the art."

This establishes the attitude of the Lines Company at that time towards the performance of its so-called contract with the City. It was ignorant, and its officers were ignorant, of any appropriate means of performing that contract as the Lines Company itself insisted on interpreting it. The respondent here, the Subway Company, has produced witnesses to say that there were people at that time in the business who knew how to lay good workable subways, but this is immaterial. The point is, that the Lines Company obtained a permit to lay subways, as they claimed, when they did not know how to lay them and had no means of doing so. It was as though a man took a contract to make a pair of shoes when he had not yet learned the trade of shoemaking.

Mr. Wilson further says (fol. 62):

> "During the period that these questions were "being litigated, (referring to the *Squires* case and "others, 1886 and 1887, etc.), the company was en- "gaged in the development of its patents, and the "manufacture of its cables, insulating material and "other apparatus, and was prosecuting the aforesaid "interference case in the Patent Office."

He further says (fol. 81):

> "During the entire period from 1892 to date, the "company has been actively employed in carrying "on its business. Its offices during this period have

"been at 11 Gold Street to 1903, and thereafter at "170 Broadway for several years, and at 32 Broad- "way, and more recently at 30 Church Street. It "has maintained an executive and office force, and "a corps of engineers and draftsmen who have been "constantly engaged in devising *a comprehensive "system of wires to supply telephone users in the "City of New York with needed wires.*"

That is to say the Lines Company expected not only to build conduits, but to create a monopoly of the wires to be placed in the conduits.

Mr. Weed, the former treasurer of the Lines Company, says (fol. 257):

"The work conducted by the Company under Mr. "Shelbourne's direction at the shop or factory in "Greenwich Street, during the first year consisted "in constant experiments with insulating material."

Mr. Warren, the former president of the Lines Company, says (referring to the early years of the Company's existence, fol. 293):

"I know also that during this period many of the "experiments made, were successful, and some of "them were at first unsuccessful, and were repeated "until final results were obtained, which were so sat- "isfactory that Mr. Shelbourne reported *that he "had a system* that was entirely practicable."

This, by the way, was not the case, the "system" was rejected by the Commissioners and was worthless. It has never since been heard of.

John H. Cahill, of the New York Telephone Company, (referring to the 17 patents obtained by Mr. Shelbourne for his alleged inventions), says (fol. 479):

"Furthermore, none of said patents was of any "practical utility, and none ever went into commer-

"cial use. They all expired more than seven years "ago."

This statement of Mr. Cahill is not contradicted in the record.

The record shows conclusively that all these experiments and all the efforts of the Lines Company from 1883 to 1907 were directed to establishing not a telephone service but a conduit or subway monopoly system. *Mr. Wilson,* Secretary of the Company and a stockholder since 1894, says (fol. 48):

> "The Company thereupon laid out its comprehensive system for conduits in the City of New York, and duly filed maps and plans in the County Clerk's office on the 18th of May, 1883, in accordance with the City Ordinances * * * (fol. 49). It has aggressively fought its opponents from 1885 down to this date, and by various proceedings in the courts endeavored to secure for itself the right to lay conduits in the streets under its franchise."

(Fol. 55):

> "At once there arose many questions concerning the proper procedure to be taken by the Company in laying its conduits, for which there was at that time a public demand, as is partly evidenced by the passage of said Act" (referring to the Act creating the Board of Subway Commissioners).

Note—These maps were filed in the County Clerk's office; they are not to be confounded with those required by the Commissioners of Electrical Subways under the Subway law. The latter were never filed because the Lines Company refused to recognize the Commissioners as a legal body in any way.

The affidavit of *George L. Weed,* an incorporator of the Company, states (fol. 263):

> "Never during my connection with the Company did it ever abandon its intention of constructing

conduits under its franchise in the streets of New York City."

The connection of Mr. Weed with the Company was, he states, from 1882 to 1905 (*see Record*, pages 85-91).

John H. Cahill, an officer of the Empire City Subway Company, says in his affidavit (*Record*, pp. 123-168), that he is an officer and one of the original incorporators of the N. Y. Telephone Company, and has been familiar with the telephone and subway conduit business during the last thirty years, and knew Mr. Shelbourne, President of the Lines Company, in his lifetime, and adds (fol. 371):

> "His purpose as expressed to me and before the public bodies was to obtain for his company the right to construct a general underground subway conduit system in the City of New York, the contract for which was subsequently awarded to the Consolidated Telegraph and Electrical Subway Company, and in turn, the low tension subways to the Empire City Subway Company, Limited. Said Shelbourne often spoke of improvements which he was making and expecting to make with respect to installation and kindred matters in connection with electrical subways, but he never spoke of a telegraphic or telephonic business except to disclaim his intention and the intention of his Company to enter into the telegraphic and telephonic business, and to devote his and its entire energies to the construction or leasing of subway conduits."

Mr. Cahill further states (fol. 403):

> "In the verified petition of said Company to the Court of Common Pleas for a writ of mandamus against Rollin M. Squire as Commissioner of Public Works, dated August 25, 1886, it was stated that 'your petitioner has never operated or intended to operate electrical conductors, its intention having always been and still being to lease to other persons, natural or corporate, all of its electrical conductors

and not to operate itself any of such conductors or any other electrical conductors.' "

In the complaint of said Company in an action brought by it against John D. Crimmins, the Board of Electrical Subway Commissioners and others, in the Supreme Court of the City of New York in 1886, which complaint was verified September 27, 1886, it was again stated that this plaintiff has never operated nor intended to operate electrical conductors, its intention having always been and still being to lease to other persons natural or corporate, all of its electrical conductors, and not to operate itself any of such conductors or any other electrical conductors. In the affidavit of *Sidney F. Shelbourne,* President of said Company, sworn to October 9th, 1886, and filed in opposition to an application made to the Attorney General on or about said date on the petition of Daniel L. Gibbons, it appears (fol. 405) that the intention and purpose of said Company was to furnish

"a general system for all other companies in New York City not only of conduits, but also a perfected and harmonious system of electrical conductors ready for use, with the greatest convenience to the Companies in said City using electricity."

Mr. Larrabee, an attorney at law connected with the Lines Company, testified on its behalf (fol. 299):

"Mr. Shelbourne's attention was called to the confusion existing in this city among the electric light, telephone, telegraph and similar Companies in this city about the year 1881, and realized that there would be a great growth in such business, involving the extension of electrical conductors throughout the city. To meet the requirements of the existing and expected situation, said Shelbourne conceived the idea of a corporation to supply the underground electrical conductors for use by various electric companies in the City of New York, although at that

time the underground electric communication was in its infancy and the art of distributing electric current except overhead by telegraphic wires was almost unknown. Many inventions, devices and new appliances now in general and common use were not then existent."

Mr. Cahill, of the N. Y. Telephone Company, says (fol. 462):

"Said Company (the Lines Company) never began its corporate business and never laid a foot of wire nor did anything whatever beyond obtaining this alleged franchise or permit, except to carry on the experiments with regard to patents and litigation in an attempt to construct a general subway conduit plan, deliberately turning its back on the business which it was incorporated by law to conduct."

The record not only shows that the main scheme of the Lines Company was to go into the electrical conduit or subway business, but within these conduits to install conductors to be leased to other Companies, and thus to establish a practical monopoly of street use for telephonic purposes. And therefore it continued year after year to postpone all action until it had perfected experiments, schemes and plans for that purpose, and meantime it absolutely declined to consider the laying and operating of telephone wires. In fact, it considered telephone operation unprofitable for lack of subscribers and impracticable as it did not hold the necessary patents, as appears from the following:

D. A. Reynolds, President of the Great Eastern Telephone Company which controls the New York Electric Lines Company, made an affidavit for the Lines Company (*Record*, pp. 105-110). He states (fol. 315):

"Until 1895 or 1896 the Bell Telephone Monopoly

controlled patents which expired in these years, and which until then prevented any independent company from operating telephones."

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"Thus it was impossible for a comprehensive telephone system to be installed in any city approximating the size of Manhattan without the permission of the Bell Telephone monopoly and that permission could not be obtained."

Mr. Wilson, Secretary of the Lines Company, said on this subject (fol. 65):

"During the preceding years the Board of Electrical Control, which had been persistently opposing this Company, co-operated with the Consolidated Telegraph & Electrical Subway Company and the latter Company had constructed in the streets of New York under the authority of the said Board, conduits and subways which supplied the public demand as it then existed, and continued to supply it down to the time when the patents for the multiple switchboard exipred as is set forth in the affidavit of Mr. Reynolds submitted herewith."

"Shortly after the expiration of the patents of the multiple switchboard and upon the insistent public demand which then arose, the Company made application to the city authorities for a permit to open the streets and to lay its conduits and wires therein."

Mr. Weed, former treasurer of the Company, testified (fol. 270):

"After the passage of this act and the decision of the Supreme Court in 1892 in the mandamus case I, with the other officers of the Company, was continuously engaged in a very careful examination, not only of the facilities for underground electrical connection offered by the companies then existing, but also of the public demand for such connections for telephonic purposes that seemed to exist. But we discovered that no comprehensive system of tele-

phonic connections could be installed in New York until the patents of the multiple switchboard expired, which, I am informed, did not occur until recently."

Opposition of the Lines Company to the City's Electrical Subway Scheme and Refusal to Take Part Therein. We have thus set forth the negative position of the New York Electric Lines Company and its attitude towards the public during the years 1884, 1885 and 1886, when the City of New York was struggling with the problem of how to place the enormous mass of telephone, telegraph, and electric wires underground. The Lines Company never so far recognized the subway system as to apply for a permit therein, prior to 1907.

> "The New York Electric Lines Company, during "the sixteen years that elapsed from the making of "the contract between the City of New York, and the "Empire City Subway Company, Limited, in 1891, "and the year 1907, never applied to said last men- "tioned company for space in its conduits or sub- "ways, nor did it ever apply to the Consolidated "Telegraph and Electrical Subway Company, which "prior to the said contract of 1891 with the Empire "Company, constructed, maintained and leased the "subways for both high and low tension conductors" (*Cahill*, fols. 406-407).

That is to say, the Lines Company never applied to either of the subway companies until the year 1907, for any permit to use the same.

And more, the Lines Company not only delayed acting itself, but it endeavored to prevent any one else from acting. The history of that episode is well known. The telegraph and electric light poles in the streets were laden with a tangle of wires which interfered with the firemen in the exercise of their duties and were a constant source of danger to human life. It became absolutely necessary to devise some system by which these wires

could be placed underground and properly regulated, not only for the present but for the future. The situation is thus described by Chief Judge Ruger in the *Squire* case (107 N. Y., 604):

> "This evil had become so great that every large "city was covered with a network of cables and "wires attached to poles, houses, buildings and ele- "vated structures, bringing danger, inconvenience "and annoyance to the public. Extensive spaces "underground were also required to lay pipes and "build trenches and arches, to transact the business "of the various corporations requiring them. These "works not only called for great skill to harmonize "the various and conflicting claims of competing "companies to rights above as well as beneath the "ground, but a comprehensive plan and supervision, "to prevent the constant disruption of the streets "and the interruption of travel. The necessity of a "remedy for these public annoyances had long been "felt and it finally culminated in the enactment of the "several statutes referred to. These statutes were "obviously intended to restrain and control, as far "as practicable, the evils alluded to, by requiring "all such wires to be placed underground in such "cities and be subject to the control and supervision "of local officers, who could reconcile and harmonize "the claims of conflicting companies, and obviate in "some degree, the evils which had grown to be al- "most, if not quite, intolerable to the public."

The N. Y. Electric Lines Company, the holders of this so-called franchise which it got for nothing, having failed or refused to file any plans with the Subway Board as the statute of 1885 required (*Cahill*, 457), instead of aiding in the solution of this problem placed itself in the front of the opponents of this reform and sought to have the Acts of 1885 and 1886, which provided for the placing of wires underground, declared unconstitutional. In that effort they were finally defeated in 1892 in the U. S. Supreme Court (*N. Y. Electric Lines Co.* v. *Squire, Com-*

missioner, 145 U. S., 175). In that case it appeared that the Lines Company refused to comply with or recognize as valid these statutes and refused to apply for the approval of the Commissioners of Electrical Subways or to submit its plans to them or to recognize their authority in any way, but endeavored to compel the Commissioner of Public Works to allow it to open the streets without the permission of said Board of Commissioners, and to build an independent system of subways, or such parts thereof as it might see fit. This attempt was condemned by this Court, which said, speaking by Judge Lamar (145 U. S., p. 190):

> "It would be an anomaly in the municipal administration if every corporation that desired to dig up the streets of a city to make underground connection for sewer, gas, water, steam, electricity or other purposes should be allowed to proceed upon its own theory of what were proper plans for it to adopt and proper excavations to make."

History of the First Litigation of the Lines Company Against the City 1886 to 1892. In the year 1886 the N. Y. Electric Lines Company began a series of litigations carried on for the purpose of establishing its right to create the anomalous condition referred to by Judge Lamar, to monopolize the electrical subway system, and to tear up the streets of New York at its own free will. An examination of the records of those controversies shows that the Lines Company never had an irrevocable contract with the City of New York in any property rights in its streets. One such litigation was an action against John D. Crimmins, sub-contractor, and others, to enjoin them from interfering with its alleged rights on Sixth Avenue, where it claimed an exclusive franchise by laying ducts for the City subways. This case was terminated in October, 1887, by a dismissal of the complaint on demurrer followed by a formal discontinuance in June,

1888. About that time there was an application by the Lines Company for a mandamus against Newton, Commissioner of Public Works, which was also dropped. These two proceedings need not be further considered. The main litigations were the *Squire* case and the *Ellison* case. The first was the *Squire* case, which finally reached this Court. It began in July, 1886, when the Lines Company made a written application to Squire, Commissioner of Public Works of New York, for a permit to open streets, make excavations and lay wires and conduits, &c. This being denied, mandamus was applied for September, 1886, in the Court of Common Pleas, by the Lines Company and denied by Judge Allen October 22, 1886, with an opinion which was affirmed by the General Term or Appellate branch of said Court on February 7, 1887 (1. N. Y. St. Rep., 633; 14 Daly, 154). The Lines Company then appealed to the Court of Appeals, being the Court of last resort in the State of New York, where the decision of the Court of Common Pleas denying the mandamus was unanimously affirmed on January 17, 1888 (107 N. Y., 593). An appeal was then taken by the Lines Company from the decision of the Court of Appeals to the Supreme Court of the United States where the said decision was affirmed May, 1892 (145 U. S., 175).

At this point it is instructive to see exactly what had up to that time been decided by the Courts in this controversy; because we say that the *Squire* case is practically determinative of the present proceeding and would be *res adjudicata* thereof if the City of New York were a party as it ought to be. Judge Allen of the Court of Common Pleas (1 N. Y. St. Rep. 633; 14 Daly, 154) had decided in the *Squire* case in denying the Lines Company's application for a mandamus against Squire as Commissioner of Public Works, that the above quoted Act (Ch. 499) of 1885 creating the Subway Commissioners was valid and constitutional and applied to the Lines

Company; and that the Lines Company could not, therefore, lay its wires in the street without the approval of the Board of Subway Commissioners obtained at that time and in the method prescribed by the statute. The object of the statute was to compel all that class of companies to come in at once, and to exclude forever those who failed to thus come in. Otherwise how could the subway plans be comprehensive or workable. The relator's counsel erroneously insists, and has always insisted, that the only point therein decided was that the application for a permit should have been made to the Board of Commissioners of Electrical Subways instead of to the Commissioners of Public Works, and, therefore, that the *Squire* case turned on a mere technical point. This is a complete misunderstanding of what was litigated and decided in that case. As the application was for a mandamus to the Commissioner of Public Works, the judgment in form merely refused that mandamus, but there were directly involved and decided in that case two propositions; *First*: that the legislative acts establishing a unified subway system controlled by commissioners was valid and constitutional and applied to the Lines Company; *Second*: that the effect of this legislation was to deprive the Lines Company of the right to construct its own subways and conduits and to compel it to submit to such regulations as the electrical commissioners should impose. And *third*, and what is most important in this case and decisive thereof, it was inferentially held that the Lines Company having failed to comply with that Statute it absolutely lost its right to enter the streets at all. Accordingly, Judge Allen's decision, rendered in 1886 and affirmed all the way up and finally by this Court in 1892, was a final and adverse disposition of the claims of the N. Y. Electric Lines Company to enter the streets of New York forever under its alleged franchise. This Act of 1885, enacted in order to unify the

electric systems of New York City, was intended to cut off forever the right to occupy the streets of New York of all such companies as failed to come in under the new system; and this was the effect of what the New York courts held on that subject. The statute of 1885, heretofore more fully referred to, provided that it should be obligatory on all companies operating or intending to operate electrical conductors, to file with the Commissioners a map or maps made to scale showing the streets, avenues or highways desired to use for said purpose. The failure to file this map terminates the Company's rights to use those subways. Such failure appears in the record in this case (*Cahill*, fol. 457). On this point Judge Allen said (14 Daly 157, 159):

> "Section 3 of said act provides that when any company, *operating or intending to operate*, electrical conductors in any such cities, shall desire or be required to place *its conductors or any of them* underground in any of the streets, avenues, or highways of such city, it shall be obligatory upon such company to file with the said board of commissioners a map or maps made to scale, showing the streets or avenues or other highways which are desired to be used for such purpose, and a general location, dimensions, and course of the underground conduits desired to be constructed. Before any such conduits shall be constructed, it shall be necessary to obtain the approval by said board of such plans of construction so proposed by such company; and said board has and shall have power to require that the work of removal or constructing every such system of underground conductors shall be done according to such plan so approved."
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> "It therefore seems to me that the Legislature intended that the Subway Commissioners should have jurisdiction over the laying of electric wires and cables, and of all companies using or intending to use underground wires through the streets, and authorize them to require conformity to plans ap-"proved by them."

And the Opinion closes with the following language (p. 165):

> "The conclusion arrived at is that the Commissioner of Public Works was correct in his refusal to allow a permit to the relator to open the streets for the purpose of laying its wires, on the ground that its plans had not been approved by the Board of Subway Commissioners as required by Section 3 of the Act of June 13, 1885. It therefore follows that the application for a mandamus must be denied."

The General Term of the Court of Common Pleas affirmed the order for the reasons given by Judge Allen (14 Daly, 166). The Opinion of the Court of Appeals was written by Chief Judge Ruger (107 N. Y., 593). It stated that the permission applied for by the Lines Company "was refused upon the ground that the relator had not obtained the approval of the Subway Commissioners of New York to its plans and construction" (p. 598). This does not mean, as the relator's counsel now pretends, that the Lines Company lost this case because it had not made the application for a permit to the proper authorities. It lost its case because it refused to come into the scheme of subway construction and management, and such refusal had the effect of excluding that company forever from a right to enter the streets. The Court of Appeals Opinion further says (p. 599):

> "These acts (referring to the Acts of 1884 and 1885 above quoted) seem to have been intended *to apply to all companies and to whatever stage of their organization they may have reached.* It is not claimed by the relator that it had ever filed with the Board of Commissioners its maps and plans as required by said Act, or that it has obtained from them its approval of such maps, &c., and it is therefore clear that Section 3 of the Act of 1885 constitutes an insuperable objection to the relator's application, unless for some reason it be adjudged to be void for unconstitutionality."

The Court then proceeds to say:

> "The relator has met this question squarely, and challenges the constitutionality of the Act upon several grounds,"

all of which grounds the Court overruled and says (p. 607):

> "The claim made by the relator in this case would authorize it to tear up the streets of the City at such times, in such places and under such circumstances as it might itself determine, regardless of the public convenience and welfare, and the right of other claimants to the occupation thereof, and place it beyond the reach of all power by the Legislature to regulate the mode and manner of the enjoyment of its rights. We do not think such a claim can be sustained. It is neither within the terms of its contract, and if it were it is still subject, in the respects mentioned, to the police power of the State."

The decision of the New York Courts in the *Squire* case therefore was in effect that the State of New York, by virtue of its police powers, might lawfully, and did require all telegraph and telephone companies to place their wires underground, as a condition of using the streets of New York, and further required them to submit to and take part in a legislative unified scheme for the placing of such wires in subways or conduits controlled by the City, and to submit their plans for approval to a board of commissioners appointed for that purpose within six months; and that the New York Electric Lines Company having failed and refused to submit such plans or to recognize said commissioners, or in any way to take part in said system, was thereby deprived of all right to the use of said subways. We say deprived, and we mean forever deprived, since that is what the reason of the statute requires. For if the Lines Company might lawfully deelay its acceptance of the legislative scheme so might all the other companies, and thus

it would be rendered nugatory, until such time as the companies desire to accede to the command of the statute; an absurd proposition.

As a matter of fact, the New York Electric Lines Company never, either then or at any other time, filed its plans with the Electrical Board nor did it ever comply with the terms of the statute in that respect.

Legal Identity of the Present Case with the Squire Case. The Lines Company therefore is mistaken in supposing and asserting and in acting upon the assertion that the present case differs at all from what was before this Court in the *Squire* case in 1892. It is in error in supposing that the only question there decided was the technical one as to whether the application for a permit should be made to the Board of Commissioners of Electrical Subways instead of the Commissioner of Public Works. It is also in error in its understanding that in that case the Court only passed adversely upon the right of the Lines Company to build conduits and subways, and that it did not pass upon its claim to lay wires. The Lines Company's claims to lay wires and to build conduits were both before the Court, for, while the Company's avowed object was to build conduits under a forced interpretation of its franchise, and thereupon to place in those conduits wires to be leased, yet the Court had before it the claim of the Company to lay wires and to operate in the streets of New York in its entirety; it had before it exactly what is before the Court in the present application; namely, the Company's charter of incorporation and its permit constituting its municipal franchise and the statute which provides, in substance, that all electric wires should be placed in a certain system of subways; that the right to such a place should be limited to such companies then existing as chose to file maps and plans and submit to the direction and control of the Subway Commissioners, and the failure of the Lines Company to operate under its permit.

Effect of Squires Decision was that Lines Company had Forfeited All Rights in the Streets. The Subway Act was sustained in that case and it was substantially held by the New York courts that the Lines Company having failed and refused to come under that Act had forfeited all right to enter the streets.

The opinions in the *Squire* case show what was before the Court (14 Daly, 154). Judge Allen says (page 155):

> "The relator is a domestic corporation organized under Chapter 265 of the Laws of 1848 as amended *for the purpose of owning, constructing, using, maintaining and leasing lines of telegraph wires or other electric conductors* for telegraphic and telephone communication and for electric illumination to be placed under the pavements of the streets, avenues and public highways of the Cities of New York and Brooklyn in the State of New York."
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> "The relator has made application to the Commissioner of Public Works for leave to make excavations in the streets of this city *so as to construct its lines of subterranean electrical wires.*"

After discussion then follows the conclusion (p. 165) that the relator cannot enter the streets because its plans were not approved by the Board of Subway Commissioners, as required by law.

In the Court of Appeals the claim of the Lines Company to lay wires was also discussed (107 N. Y., 593). The Court says (p. 598):

> "Application was made by it to the Department of Public Works of New York for permission to open some of the streets in the city *for the purpose of laying therein its wires and conductors.* This permission was refused upon the ground that the relator had not obtained the approval of the Subway Commissioners of New York to its plans and construction."

It thus appears as a fact in this case that a valid statute of the State of New York as interpreted by its highest court cut off and extinguished the relator's alleged franchise for failure to comply with the essential and reasonable police provisions therein contained, and which were within the reserve powers of the State at the time the alleged franchise was given.

Formal Revocation of the Lines Company Permit. Fourteen years after the decision in this Court in the Squire case the Lines Company made a new application for a permit in March, 1906, to Ellison, Commissioner of Water Supply, Gas and Electricity. By this time the City authorities, having every reason to be satisfied that the aldermanic permit granted to the Lines Company twenty-three years before was abandoned and defunct, and was being used a means of annoyance to the City and to promote stock jobbing instead of for the public benefit, formally revoked the same. In view of the circumstances, this may have been an unnecessary formality, but it was perfectly proper as a formal act and notification to the public, who were being asked to invest in the valueless securities of the Lines Company. The Statute of 1885 having provided for an exclusive system of City subways under a Subway Commission and that act having been sustained by the Courts, the Lines Company could no longer even pretend to have subway or conduit franchises. As for franchises to lay and operate wires, that had been repudiated by the Lines Company over and over again, and the permit never having been acted on had long since died. The revocation which was passed by the Board of Estimate and Apportionment as having succeeded to the power of the Board of Aldermen, was adopted May 18, 1906, in the following language (*Record*, p. 127, fol. 379):

WHEREAS, The New York Electric Lines Company,

under a resolution of the Board of Aldermen, passed April 10, 1883, claims to have received permission to open the streets of the city and construct subways in which to place wires for telegraphic and telephonic communication and for electric illumination, and by reason thereof claims a perpetual franchise in the streets of the city; and WHEREAS, The said Company has failed and neglected to construct such subways and lay said wires for over twenty-three years, and now seeks leave to open the streets, and construct subways and lay wires therein for the use of the Great Eastern Telephone Company, under its said alleged perpetual franchise therein; and WHEREAS, If said company has not lost its corporate existence and all its charter rights and privileges, by reason of its failure to satisfy and comply with the terms of the statutory enactments applicable thereto, in the opinion of this Board, it has long since forfeited by reason of non-user all rights and privileges it may have secured under the permission granted by said resolution of the Board of Aldermen on April 10, 1883; it is therefore RESOLVED, That any and all rights or privileges to the use of the streets, if any such rights or privileges still exist, acquired by said New York Electric Lines Company under the permission granted said company by the said resolution of the Board of Aldermen passed April 10, 1883, be and hereby are revoked and terminated; and the resolution of the Board of Aldermen adopted on such date is hereby in all respects repealed and revoked.

History of the Second Main Litigation of the Lines Company Against the City Officials 1906-1907. In June, 1906, a new set of mandamus proceedings was commenced in the Supreme Court by the Electric Lines Company against William B. Ellison as Commissioner of Water Supply, Gas and Electricity, who had succeeded to the powers of the former Subway Commissioners, to compel him to grant a permit to the Lines Company for permission to construct subways or conduits. The mo-

tion for a preemptory mandamus was heard before Judge Bischoff of the Supreme Court in June, 1906, and was denied (51 N. Y., Misc. Rep., 413). This order of denial was unanimously affirmed by the Appellate Division of the Supreme Court in 1906 (115 App. Div., 254), and that decision was in turn unanimously affirmed by the New York Court of Appeals in 1907 (188 N. Y., 523). A writ of error taken to this Court by the Lines Company was abandoned (214 U. S., 529). In this case the Lines Company appears to have confined its application to the building of conduits or subways and the opinions rendered were therefore also confined to that subject. Judge Bischoff denied the application on the sole ground that the Subway Act substantially created an exclusive and unified system of subways. The Court said (51 Misc., 417):

> "The effect of the Subway Act was to give the relator sixty days in which to assert its right to lay its wires in its own conduits; and thereafter it was in no better position than any other person or corporation for the purposes of a claim of right to open the streets and operate a private and individual system of its own."

The affirmance by the New York Appellate Division was upon substantially the same ground. The Court said (115 A. D., 258):

> "A failure of this relator to have the plans approved by the Board of Commissioners of Electrical Subways or the officials who have succeeded to the power vested in such Board as required by Chapter 534 of the Laws of 1884 and Chapter 499 of the Laws of 1885 justified the Court below in denying this application under the decision of the Court of Appeals in 107 N. Y., 593."

and further that the right of the Lines Company to construct a subway has lapsed. The learned Appellate Division said (p. 261):

"I think that under these provisions of law and con-

tracts made under legislative authority and ratified by the Legislature (referring to the Subway Construction Contracts) the right of this relator to construct a subway lapsed, it having failed to procure the approval of its plans for the construction of such subway within sixty days after the passage of the Act of 1885."

The denial was put upon a further ground that is fatal to the Lines Company here; namely, that the franchise never having been acted upon, had been extinguished. The Court said (p. 262):

"Nor do I think there was any contract between the relator and the City of New York which was impaired by this action of the Legislature and the board acting under its authority. To constitute a contract between the City of New York and the relator I think something more must exist than the mere granting to the relator permission to use its streets. No franchise was granted by the City of New York. The franchise, if any, was granted by the State. Undoubtedly, when the consent of the City was given, if that consent had been acted upon and the subways constructed, a property right would have been acquired which the city could not take without compensation; but where, under these statutes, a mere right is given, subject to the consent of the city, the consent of the city itself grants no franchise or create no contract until it is acted on by the grantee. This consent is spoken of by the learned counsel for the relator as a grant from the city. The statute (Laws of 1881, Chap. 483, amdg. Laws of 1879, Chap. 397, §1) provides that 'any company or companies organized and incorporated under the laws of this state * * * are hereby authorized, from time to time, to construct and lay lines of electrical conductors underground in any city,' etc., 'provided that such company shall, before laying any such line in any city, village or town of this state, first obtain from the common council * * * permission to use the streets within such city, village or town for the purposes herein set forth." On April

10, 1883, the Board of Aldermen of the City of New York passed an ordinance which provided 'that permission be and hereby is granted to the New York Electric Lines Company to lay wires or other conductors of electricity in and through the streets, avenues and highways of New York City, and to make connections of such wires or conductors underground by means of the necessary vaults, test-boxes and distributing conduits.' The relator gets its right to use the streets from the state. But that right does not accrue until the municipal corporation gives permission. When that permission is once given then the right is complete. But it cannot be that a municipal corporation, having given its permission, is bound hand and foot so that the permission can never be revoked, although the corporation neglects to act under it and construct its lines for such a period as would divest a person of real property by adverse possession. All of the elements of a contract are wanting. The relator assumed no obligation whatever in relation to the construction of the subway. All it ever agreed to do was that when it built the subway it would comply with the conditions imposed. Until the permission granted was accepted by some act of the corporatio nunder it, I think there was no contract. If the relator had agreed to construct these subways within a specified time a different question would have been presented, but in all the cases where these grants of franchises have been held irrevocable it was because there was an obligation to construct the thing granted or the grantee had acted under the grant and had constructed it. In those cases a consideration would be apparent. The relator had not acted under the permission granted by the common council. No subway has been built, and as I view it, no right was acquired that was not subject to legislative control. The order should be affirmed, with fifty dollars costs and disments."

The Court of Appeals, five judges sitting, unanimously affirmed the decision of the lower courts substan-

tially upon the ground that the effect of the Act of 1885 was to deprive the Lines Company of any franchise or right it might have had to construct its own subways or conduits, and that if it had any right to lay wires, upon which question not being before the court it did not pass, such a right was confined to the laying of wires in the subways already constructed. Judge Chase thought that the Lines Company was never entitled to lay conduits except as an incident to the laying of wires (p. 530). With him two judges concurred in the opinion, but Judges Haight and Werner concurred in the result only.

Summary of the Effect of the Squires and Ellison Decisions. It is difficult to see that there was anything before the Court or to be decided in the *Ellison* litigation which had already not been decided in the *Squire* litigation. As Judge Ingraham said in the *Ellison* case (115 App. Div., 257):

> "I have searched this record in vain to find that the relator stands in any different position in relation to its rights to a permit to use the public streets than it did in 1886 when its application for mandamus was made and denied."

In fact, the *Squire* decision was adverse to the claims of the Lines Company both as to wires and conduits; the *Ellison* decision merely affirmed it as to conduits only.

The whole transaction then comes down to this: The Lines Company obtained an aldermanic permit in 1883 at a time when there was no underground electrical construction in the streets of New York, which permit, coupled with its state charter, gave it authority within a reasonable time and with due expedition, to lay down in the streets of New York telegraph and telephone wires protected, presumably, by such coverings or conduits as might be necessary for that purpose. Two years having passed and that permit not having been acted upon,

the Legislature in 1885 devised and established a scheme of municipal subways within which all such wires should be placed, and provided that all companies having franchises for underground construction should file their plans with the Commissioners of such subways within six months or to be excluded from the system. This was a valid police regulation. It was especially effective as against the Lines Company, which was in default for failure to operate its franchise for two years. The Company declined to come under the statute. The courts of New York not only decided that it had no right to conduct its own street conduits, but, as we have already stated, virtually held in the *Squire* case that its franchise was terminated at least by the operation of the Subway Act of 1885 when it failed to take advantage thereof if not before.

Third and Present Litigation; the Lines Company Against the Subway Company. This brings us to the present litigation, which commenced in July, 1910, when the last mandamus proceedings were begun before the Supreme Court, New York County, by the Lines Company against the Empire City Subway Company to compel it to provide space in its subways for the electrical conductors of the Lines Company in accordance with a prior application made June 7, 1910. Said mandamus was denied by Judge Bischoff at Special Term and the denial affirmed by the Appellate Division and by the N. Y. Court of Appeals; and a motion for a re-argument denied by the latter Court (69 N. Y. Misc., 200; 140 N. Y. App. Div., 934; 201 N. Y., 321; 202 N. Y., 587).

The decisions of the New York courts in the present proceeding were these in general effect. Judge Bischoff at Special Term, held that the Aldermanic permit of 1883 granted to the Lines Company had been lawfully revoked by the Board of Estimate and Apportionment, and therefore denied the motion for a mandamus (69 N. Y. Misc.,

200). The New York Appellate Division, the next Court of Review, affirmed this decision in a brief memorandum as follows: "Order affirmed with $10.00 costs and disbursements, on the authority of *People ex rel. New York Electric Lines Company* v. *Ellison* (115 App. Div., 254; Affd. 118 N. Y., 523)." The grounds of the *Ellison* decision have just above been stated. They were in substance, that the Lines Company had failed to comply with the Subway Act of 1885, requiring it to file plans with the Commissioners, and that the Aldermanic permit of 1883 was revocable in the absence of any binding obligation upon the part of the grantee to construct under the permit; and also in the absence of any actual construction thereunder. The New York Court of Appeals, the court of last resort, in its opinion, 201 N. Y., page 32 (handed down in March, 1911), interpreted the Aldermanic permit of 1883 as intending a permit to construct underground passages for the laying of wires for the purpose of renting such wires to telegraph and telephone companies, and pointed out that the purpose of the Lines Company was still to rent wires to another company, presumably The Great Eastern Telephone Company; and not to operate for itself; that the Legislature had practically annulled the Aldermanic permit by its Subway Legislation, and thus ended any right the Company might have had to construct its own subways, and that such legislation had been sustained by the courts of New York as well as by the U. S. Supreme Court. As to the claim of the right to operate telephonic or telegraphic business and to supply instruments therefor, etc., that had never been included in the original permit; the Lines Company had never been granted the franchise to enter the conduits for that purpose, and the Court should not now give it powers not embraced in or contemplated by the Aldermanic permit of 1883. The Court of Appeals further held that the said Aldermanic permit amounted to no more than a revocable license, and

in the absence of actual performance thereof by the Lines Company, the Board of Estimate and Apportionment had the power to revoke, and did revoke said permit. All the six judges sitting concurred in this decision.

Briefly, the substance of the decision of the New York Courts in the present case is that the claim to occupy the streets for electrical subways has been already decided adversely to the Lines Company, in the Courts of last resort; and that as to its claim to occupy the City subways for telephonic purposes, it never had a franchise therefor, either on a proper interpretation of the Aldermanic permit of 1883, or upon its own original interpretation thereof; and further that whatever privileges the permit may have conferred were properly revoked for failure to act thereon.

This brings us naturally to the question whether this record sustains the New York Courts in their finding of a total failure on the part of the Lines Company to act upon the permit of 1883. We presume such finding of fact is final and conclusive here, especially in a proceeding of this kind, nevertheless, we briefly refer to the record evidence on that point.

Reference to Record Proof of Lines Company's Failure to Act under its Permit. During the whole period from 1883 to June, 1910, no attempt was made by the Lines Company to lay its wires in the streets of New York in conduits constructed by itself or otherwise whether prior or subsequent to the Act of 1885; nor did it ever offer to lay its wires in the City subways until its application of 1910 now before the Court. In other words, during the two years from 1883 to 1885, when it had the apparent right to lay down its own wires and conduits, it neglected to do so, and after 1885, when the City subways were constructed, it neglected or refused to make use of them. Thereafter, from 1883 to 1910, the Lines Company made no legal or effective effort to avail

itself of the Aldermanic permit of 1883. The record is clear and emphatic on this point. Mr. John H. Cahill of the Telephone Company says, in his deposition of August 2, 1910 (fol. 378):

> "The said alleged franchise was never acted on by said Company, nor any work done or moneys expended in pursuance thereof, but on the contrary there was non-user of the said alleged franchise and an abandonment of the same from the time it was passed by the Board of Aldermen April 10, 1883, until on or about the 11th day of May, 1906, when the same was revoked and terminated by the legislative authority of the City of New York, to wit: the Board of Estimate and Apportionment."

The same affiant further says (fol. 457):

> "The first year of the relator's incorporation expired on October 14, 1883. Up to that time it had taken some steps towards its corporate organization, obtained its alleged grant from the Board of Aldermen and perhaps filed a map, and that is substantially all. It had not obtained a permit to actually open any street, nor had it opened a foot of street nor laid a foot of wire, nor has it ever done so. There is nothing to show that during that period it had any plans approved, or material or appliances for entering upon the construction of subways or underground electrical conductors. It did not apply to any local authority for a permit to enter upon its work of opening the streets for more than two years after this time, and when applied for it was denied."

Again (fol. 468):

> "The fact is that during all the years from 1883 to 1892 the efforts of that company were wholly confined to legal proceedings in an attempt to instal a system of conduits, not wires, underground, which efforts were wholly unsuccessful."

Again (fol. 473):

> "The fact is that the New York Electric Lines

Company failed to lay a foot of wire or a foot of conduit subways, and so far as I have been able to ascertain after diligent inquiry, they have not expended any money otherwise than in unsuccessful litigation in their attempt to establish a right to do a conduit business instead of a telegraphic or telephonic business."

Further on the same witness says (fol. 476):

"From my familiarity with the telephone business in the City of New York since its inception I am in a position to state, and do state, that no part of the moneys alleged in the moving papers to have been disbursed or expended in the business of the New York Electric Lines Company was ever expended in the business for which the said Company was created, as specified in its certificate of incorporation. I know of my own knowledge that it never has conducted or attempted to conduct a telegraph or telephone business in the City of New York. Some moneys were expended by Mr. Shelbourne, the former president of the company, and by those associated with him in an endeavor to instal a conduit system in the City of New York, but the public authorities and the Courts uniformly held that the New York Electric Lines Company had no right to instal such a conduit system and in fact no part of any such system was ever installed in the City of New York, or attempted to be installed otherwise than through proceedings in the Courts which were all held to be unfounded."

These statements are uncontradicted.

The Lines Company from the Beginning was a Mere Paper Organization and Presumably was Financially Unable to Organize and Maintain a Telephone Business in the Great City of New York. The fact is that the Lines Company during this whole period was nothing more than a paper organization. It had no financial backing, no place of abode, no real business existence. Probably some money was raised from time to time by those, who-

ever they were, who were speculating upon the various law suits which were being carried on in the name of the Company; and payments, real or fictitious, were made to counsel for that purpose. As far as can be ascertained this is the only basis for the claims that money was expended in the operations of the Company, for it is impossible to find anything upon which such money could possibly have been spent other than counsel fees and the expenses of litigation. The Lines Company got no money in return for its capital stock or anything else other than a number of patents issued to Shelbourne which never had any commercial value and have long since expired.

Mr. Cahill in his affidavit says (fol. 440):

> "In a report made by the New York Electric Lines Company to the State Board of Tax Commissioners for the year 1899, verified by George L. Weed, as Secretary and Treasurer on the 30th day of October, 1899, it is stated as follows:
>
> 'The Company has patents of the U. S. almost expired now for which the capital stock was issued but these patents cannot be used as the authorities refuse to give us permission to open the streets or use our franchise and our rights are still pending in the Courts.' "

The record shows that these patents never had any commercial value (fol. 479; 621).

Careful research has been made to ascertain if there was any trace of the Company's tangible existence or dwelling place in all the years of its existence. Its officers stated that it had offices at 11 Gold Street, in the Queen Building on Wall Street, 170 Broadway, 32 Broadway and 30 Church Street (*Wilson*, fol. 82; *Weed*, fols. 255-256). A thorough search and investigation discloses the fact that it never had any office at any of these places *Goldberg*, Aff., fols. 919-929; *Eaton*, 940-942; *Harris*, 943-945; *Weeks*, 946-954; *Ludlow*, 955-959; *Laurancelle*, 961-965). The record shows conclusively that from 1883 to 1909 the New York Electric Lines Company had no

place of abode and no tangible existence whatever. Mr. *Cahill* testifies (fol. 370) that for the last thirty years he has been entirely familiar with what has taken place in the City of New York in the telephone and subway conduit business (fol. 370) and that

> "The New York Electric Lines Company was not at the time of the passage of the Act of the Legislature in the year 1892, Chapter 263, or at any other time, a corporation which was recognized as existing and doing a business" (fol. 375).

The stock of the company, of which the par value was $100, sold as low as one-half a cent a share. Mr. Cahill testifies, referring to a verified report made by the Lines Company to the State Board of Tax Commissioners in the year 1899 (fol. 441):

> "Capital Stock—Market Value During Year, Highest ½ cent a share. Lowest ½ cent a share."
> "The New York Electric Lines Company has never paid any personal taxes on property within the County of New York." (*Shipman,* 512-513.)

In 1910 an assessment for $100,000 was levied against it and sworn off by its officers (*Shipman,* fol. 513). In 1901 it is reported as being entirely without assets by report filed in the office of the Clerk of the County of New York (*Goldberg,* fol. 935).

The special franchise reports made by the New York Electric Lines Company to the State Board of Tax Commissioners were examined. They cover the years from 1899 to 1909 and show that the capital stock was issued for patents which had expired or were about to expire; that the market value of its stock varied from one-half a cent a share to two cents a share, and

> "in each and all of said reports it is stated that said New York Electric Lines Company had no property or assets whatever." * * *
> "In each and all of said reports it is stated that

> the said Company has never exercised any rights to do business in or under the streets of the City of New York, and none of said reports shows any receipts from, or disbursements for, operation, and said reports state that the Company did not operate." (*Ferry*, fols. 1152; 1155; 1156.)

Surely it cannot be claimed that the State is powerless to rid itself of a supposed contract with a paper corporation which was made without consideration and which was never acted upon or attempted to be carried out by the corporation party thereto, and where the facts show that the corporation was utterly without the least intention or disposition to perform such contract, and practically abandoned it for over two years. It cannot be that the mere passage of a resolution giving a permit to such a sham and lifeless corporation creates a contract which will bind the State and the City forever.

The Attempted Transfer of the Lines Company's Franchise Rights to a Foreign Corporation Known as The Great Eastern Telephone Company. It is perfectly evident from this record that the New York Electric Lines Company no longer controls whatever rights it originally had under this permit, but that the same are in the hands of the Great Eastern Telephone Company, a South Dakota corporation. *Mr. Wilson*, the Secretary of the Lines Company, says that (fol. 50):

> "It has more recently employed a force of engineers who have planned a comprehensive system of wires to be installed in the conduits of the Empire City Subway Company to supply telephone users, and especially the Great Eastern Telephone Company with wires."

Reynolds, the President of the Great Eastern Telephone Company, says (fol. 317):

> "After careful examination by various able counsel the Great Eastern Telephone Company entered

into a contract with the New York Electric Lines Company relying upon the charter of that company and its franchise to place wires in the streets of New York."

Mr. John H. Cahill says (fols. 387; 389-392):

"The New York Electric Lines Company was not at the time of the commencement of this proceeding engaged in any business, but had turned all of its business and property over to the Great Eastern Telephone Company." * * * "It was expressly provided by the ordinance of the Board of Aldermen of April 10, 1883, being the so-called franchise of the relator, that the permission 'is conditioned that the said company shall not transfer or dispose of the franchise hereby granted without the further authority of the Common Council, and that it will make no discrimination of individuals or corporations in the rental and use of its lines or wires which may be laid down hereunder.'

"The New York Electric Lines Company is not the real party in interest in this proceeding.

"It is not true that the New York Electric Lines Company has not transferred any of its franchises to any other company or individual. All of the rights, franchises and property of the New York Electric Lines Company were transferred and disposed of by the relator to the Great Eastern Telephone Company, a corporation organized under the laws of South Dakota, known as a 'holding or pioneer company', long prior to the commencement of this proceeding, and at the time of the commencement of this proceeding the said Great Eastern Telephone Company of South Dakota was and now is the sole owner of all the franchise rights and property of said New York Electric Lines Company, the relator, subject to a so-called 'perpetual lease of telephone rights' which said Great Eastern Telephone Company of South Dakota had prior to the commencement of this proceeding executed to the Great Eastern Telephone Company organized under the laws of the State of New York, known as an

'operating company' and which latter company is intended to develop 'telephone rights' only.

"By the transfers and dispositions aforesaid the said New York Electric Lines Company divested itself of all of its rights, property and franchises, and the transferee, the South Dakota Company, has attempted to split up or subdivide said franchises so as to transfer only so much of said franchises as relate to the so-called 'telephone rights' to the New York corporation of the same name, retaining or attempting to retain so much of said franchises as relate to the telegraphic and electric illuminating businesses, which it claims, for itself.

"If such transaction shall be held to be lawful, the result will be that under one permission or franchise several corporations will be conducting several businesses and systems under the streets of the city."

A letter from Mr. Reynolds as President of the Great Eastern Telephone Company addressed to the Tax Department of the State of New York is in the record as follows: (fol. 519).

"New York, January 24, 1910.

Department of Taxes and Assessments,
Hall of Records, New York.

Gentlemen: In enclosing the within blank I would state that the Great Eastern Telephone Company is incorporated for $1,000,000 and will ultimately be used as an operating telephone company under a franchise granted in 1883, but at the present time has no property, has never issued more than the organization shares, fifteen in number, which have been signed in blank and now repose in the company's safe. Very truly yours, D. A. Reynolds."

Mr. O'Driscoll testifies that at an interview in 1910 with Mr. Reynolds of the Great Eastern Company and Mr. Wilson of the Lines Company he was told that the Great Eastern Telephone Company of *South Dakota* had

been formed as a holding company and owned the New York Electric Lines Company; that a third company known as the Great Eastern Telephone Company *of New York* was going to be the operating company, but that it had no property and needed no property, and Mr. O'Driscoll was thereupon furnished with what is called a financial plan which is copied into the record (fols. 632-633). Circulars had been sent out by the Great Eastern Telephone Company to the same general effect and are in the record (pp. 245-257; fols. 733-763; also pp. 265-306; fols. 793-918), where the whole stock jobbing scheme is set forth.

The Great Eastern Telephone Company is another paper company. Mr. Shipman states (fol. 516):

> "A further search in the Department of Taxes and Assessments during the current month shows the following facts with respect to the personal taxes of the Great Eastern Telephone Company:
>
> "In 1907 the personal property of that Company was assessed at $100,000, but it was reduced upon its sworn report to $1,000. In 1908, 1909, 1910, its personal property was assessed each year at $1,000, but in each instance such assessment was sworn off in its report and no taxes whatever has been assessed against or paid by said Company for the years 1908, 1909, 1910."

He further states (fol. 520):

> "A further search during the present month in the said Department of Taxes and Assessments shows that the Great Eastern Telephone Company has never at any time been assessed for a franchise tax. In the sworn report signed by D. A. Reynolds in his official capacity, filed by the Great Eastern Telephone Company, for the year 1910, for the purpose of escaping taxation, it stated on the printed blank as follows:
>
> '15. The assessed value of the corporation real estate in this State including its special franchises. Answer: Nothing.'"

The Great Eastern Company issued a circular, page 324 (fol. 972) in which it gave an address, 1125 Flatbush Avenue, Brooklyn, where, as a matter of fact, the Company was never known or heard of (*Goldberg*, fol. 930; *Miller*, fol. 973; *Briard*, fol. 976.) It has not even the right to do business in the State of New York.

> "No statement has been filed in the office of the Secretary of State of New York by the Great Eastern Telephone Company of South Dakota, which is required to enable it to do business in this State, as appears from the annexed certificate of the Secretary of State marked Exhibit A." (*Goldberg*, fol. 934.)

Mr. Cahill says (fol. 397):

> "The said Great Eastern Telephone Company is not a corporation authorized to carry on a telegraphic or telephonic business in the City of New York or to lay its conductors under the streets of the City of New York."

The attention of the Court is here called, in view of the practical transfer of the New York Electric Lines Company's franchise or of the control thereof to these two paper Great Eastern Telephone Companies, to the language of the original permit of 1883 (fol. 177):

> "Resolved, that the permission of the said New York Electric Lines Company hereby intended by the Common Council is conditioned that the said Company shall not transfer or dispose of the franchise hereby granted without the further authority of the Common Council."

All these facts establishing the existence of these illegal arrangements between the Lines Company and this South Dakota corporation and its paper representative in New York are fully set forth in this record and were before the New York courts at the time that they decided to deny this mandamus.

POINT I.

This Court cannot take effective jurisdiction of the Federal question sought by the plaintiff in error to be raised on this appeal, for the reason that the City of New York, which is the principal party interested, is not before the Court.

The relator below, the New York Electric Lines Company, the plaintiff-in-error here, asks here and now to have this Court exercise its highest function of declaring unconstitutional and nugatory a legislative act of the City of New York enacted May 11th, 1906, revoking the Aldermanic license of 1883, under the provision of the Federal Constitution which forbids a state to pass any law impairing the obligation of contracts. The law or ordinance which it is thus sought to nullify was passed by the City of New York under the authority of the State, and therefore is to be treated here as a state law. It has been sustained by the inferior courts and by the highest court of the State of New York. We respectfully submit that this Court in the exercise of its high functions ought not and lawfully cannot overrule the State courts and set aside this enactment without the presence in this Court of the City of New York; and that as the City of New York has not been cited here this writ should be dismissed or the judgment affirmed.

This is not a case where the unconstitutionality of the municipal ordinance in question can be determined from a mere inspection thereof. The ordinance of revocation (*Record*, p. 169; fol. 505) is perfectly valid on its face, for the permit on its face is revocable, and the revocation resolution recites the failure of the Lines Company to act thereon for over twenty-three years. There is, indeed, no pretense that this revocation ordinance is void

or voidable on its face, or impairs any written or undisputed contract before the Court. The Contract which the State and City are charged with having impaired is a disputed contract; its very existence is disputed. It is not a matter of record, but the Lines Company seeks in this proceeding to establish the same by proof of controverted facts; of acts said to have been performed by it under this permit about thirty years ago, and claimed by it to constitute an estoppel against the City. The plaintiff-in-error in effect asks this Court to overrule the State courts; to set aside their finding that no such contract ever existed; to investigate for itself facts not of record, and to declare that upon the facts thus found there existed in 1906 an equitable obligation on the part of the City towards the Lines Company, estopping the City from revoking this apparently obsolete and dead ordinance of 1883. That this Court has power to do so much in a proper case is not denied; but it is perfectly obvious that before it can be done here, the City itself must be heard.

In the case of the *City of Louisville* vs. *Cumberland Telephone and Telegraph Company* (224 U. S., 649), relied upon the plaintiff-in-error, the City of Louisville was a party and had a hearing; and, therefore, this Court was authorized and had jurisdiction to declare the existence of the irrevocable contract therein established. It is impossible, in the nature of things in this case, to ascertain judicially whether or not such a contract exists without the presence in this Court of the City of New York, the other party to that contract.

The defendant-in-error, the Empire City Subway Company, cannot represent the absent City of New York. It is, as appears by the record (fols. 29, 30, 31), a New York corporation operating the electric subways and charged under its contract with the City with the obliga-

tion of providing space therein for "any and all companies having lawful power to operate telegraph or telephone conductors in any street in the City of New York whenever any of such companies shall apply for the same." It is not a department of the City nor pretended so to be, but is a corporation having a contract therewith. Its duty, if any, to the plaintiff-in-error, arises under that contract which is printed in the record *in extenso* (Ex. A, pp. 31-47), and shows that the defendant-in-error is entirely outside of the controversy which the plaintiff in error bring up here. And more, the contract in terms provides (fol. 117) in the clearest language that the Empire Company "shall not be deemed to be the servant or agent of the City of New York but an independent party." This is, therefore, really an attempt by the plaintiff-in-error to establish as valid and subsisting, an alleged equitable contract between itself and the City of New York by a proceeding solely against the Empire City Subway Company which was neither a party to said contract nor privy thereto. On basic principles such an attempt must necessarily fail.

The legal interests of the defendant-in-error are not those of the City in this case. It is not legally interested, as the City is, in defeating the application of the plaintiff-in-error, because it is entitled to receive rent from the plaintiff-in-error, or any other company, occupying space in its subways. It is evident that such a corporation cannot be in a position properly to litigate the question of what relations were established between the City of New York and the plaintiff-in-error, by a transaction occurring twenty-five or thirty years ago.

No doubt the New York Electric Lines Company would be entitled, in a proper proceeding, to have this Court decide whether or not the revocation ordinance of 1906 was passed in violation of the Federal Constitution, and of the contract rights of the Lines Company and to establish such contract by evidence of facts outside of the writings; but to do this it must bring the City of New York into Court, either as a party to its mandamus proceeding, or by a bill in equity or other proper remedy.

POINT II.

The revocation on May 11th, 1906, of the Aldermanic Permit of 1883, by the New York Board of Estimate and Apportionment, cannot be held to be an impairment of any existing contract between the New York Electric Lines Company and the City of New York, because no such contract is established by the record here.

The Aldermanic resolution of 1883 was not in terms a contract, but a mere permission or license. The statutes did not give the Board of Aldermen any power to make such a contract, and that body did not pretend to do so. The statute (L. 1879, Chap. 397) provide sfor the laying of wires underground upon "*permission* to use the streets," etc., and the language of the Aldermanic resolution of 1883 is "resolved that *permission* be and hereby is granted to the New York Electric Lines Company."

It contained no contract or agreement whatever on the part of the Lines Company, and no consideration was paid therefor by the relator; so that even had the City agreed to do anything, such agreement would have been void, as a nude pact, for want of mutuality (*Dorsey* v. *Packwood*, 12 Howard, U. S., 126).

Counsel for the relator urge that this Aldermanic permit vested a substantial interest in the Lines Company because it affected certain real estate, namely, the City streets. That is to say, it was a real property license. But the law of license as affecting real property is well settled, and its application to this question is just as clear in the case of a street permit as of any other license. The law is fundamental that such a license does not constitute a contract and is generally revocable at the will of the grantor (*De Haro* vs. *U. S.*, 5 Wall, 599).

In this case it was granted wthout payment of any consideration, and therefore came within the class of such as are revocable at any time. In the *De Haro* case last above cited, the Court said: "There is a clear dis-"tinction between the effect of a license to enter lands "uncoupled with an interest, and a grant. A grant "passes some estate of greater or less degree, must be "in writing and is irrevocable, unless it contains words of "revocation; whereas a license is a personal privilege, "can be conferred by parol or writing, conveys no estate "or interest, and is revocable at the pleasure of the party "making it." (5 Wall. at p. 627.) As the Board of Aldermen had no power to make a grant of the streets, or to give anything more than a mere permission for their use, this resolution of theirs was a license merely. Probably this will be conceded by counsel for the plaintiff-in-error; but it is claimed that a contract between the City of New York and the grantor arose by virtue of the acts of the relator subsequently performed in reliance upon this license; that is to say that a contract was created by estoppel. Such a contract might be implied under well known principles of equity, which would apply just as well in the case of a permission granted by an individual as in the case of a permit by a municipal body. But that would only be where the licensee in pursuance of the license itself and by actually carrying out the privileges thereby granted and upon the strength thereof would have incurred such expense as to entitle the licensee to compensation in damages for its revocaton, or in case of full performance, so that equity would require the maintenance of the existing situation and therefore the continuance of the license.

Now, on this point there was a direct issue raised by the denial on the part of the Subway Company (the respondent here) of the relator's assertion that any such expense had been incurred. The New York practice does not require and the record does not contain a formal an-

swer on the part of the Subway Company; but the affidavits as already quoted contain this denial expressed in the strongest terms and well supported by allegations of fact (*Afft. Cahill,* fols. 378, 457, 468, 473, 476). This condition of the record is fatal to this appeal. This Court does not sit to determine issues of fact on a writ of error in a case like this. And it appearing that there was a genuine controversy as to a fact necessary to the relator's case, and that the State Courts necessarily decided that fact against the relator, the appeal to this Court must fail. The finding of the State Court is conclusive on the facts that there was no performance and therefore no contract as alleged and therefore there is no basis for a review here. The proposition that this Court will examine for itself the question whether there was in fact a contract which has been impaired by State Legislation is modified by the rule which forbids this Court to examine disputed questions of fact in the first instance.

Minneapolis & St. L. R. Co. vs. *Minnesota,* 193 U. S., 53;
Chrisman v. *Miller,* 197 U. S., 313;
Hedrick v. *Atchison, T. & S. F. R. Co.,* 167 U. S., 673;
Gardner v. *Bonestell,* 180 U. S., 362;
Chapman v. *Bigelow,* 206 U. S., 41.

The *Minneapolis* case first above cited is on all fours with this one. It was a mandamus proceeding brought here on writ of error from the Supreme Court of Minnesota upon questions arising under the Federal Constitution. The Court held that it was so bound by the findings of the State Court that it was unable to say that a Federal question was involved in the case, and said: "the charge is that the property of plaintiff-in-error is taken without due process of law; but whether so taken is made to depend upon a question of fact. * * * It is well established that on error to a State Court, this Court can-

not re-examine the evidence. And when the facts are found we are concluded by such finding. * * * The finding, like the verdict of a jury, is conclusive in this Court." * * * (193 U. S., 64-65.) Judgment was accordingly affirmed.

But in fact the evidence is conclusive that the relator did nothing and incurred no expense whatever in the direction of the carrying out of the work which he was licensed to do by the Aldermanic permit of 1883. The permission was (fols. 172-173), "To lay wires or other "conductors of electricity in and through the streets, "avenues, and highways of New York City, and to make "connections of such wires or conductors underground "by means of the necessary vaults, test boxes and dis-"tributing conduits, and thence above ground with points "of electric illuminations or of telegraphic or telephonic "signals in accordance with the provisions of an ordi-"nance to Regulate the laying of Subterranean Tele-"graph wires and electric conductors in the streets of the "City, passed by the Common Council and approved by "the Mayor December 14, 1878." This is a permission to lay wires or other conductors of electricity in the streets of New York and to make connections thereof; and this was what the relator was entitled to do under its certificate of incorporation which was, "for the pur-"pose of owning, constructing, using, maintaining and "leasing lines of telegraph wires or other electric con-"ductors for telegraphic and telephonic communica-"tion," etc. But there is no pretense that this company ever laid any wires or other conductors of electricity in and through the streets, avenues, or highways of New York City, as it was, according to the terms of its permit or license, permitted to do. Its claim is merely that it performed *experiments* of some kind relating to subway constructon at a considerable cost and that it carried on litigations in which it was defeated, and wherein

it must therefore have been presumed to have been in the wrong.

The evidence on these points has been already referred to and collated in this brief, and need not be repeated here. Briefly, it is to this effect: From April, 1883, when the Lines Company obtained its permit, until September, 1886, a period of three years and five months, the plaintiff-in-error did nothing except to experiment and obtain patents, which were never used by anybody. Meantime, the present civic electric subway system, the need whereof was urgent and even imperative, had been devised and was under way. Then in September, 1886, began the Lines Company's litigation against the City in which it was persistently in the wrong and which continued until 1907, at considerable cost, as is stated. Meantime no wires or conductors had been laid down or attempted to be laid down in the streets, by the Lines Company, and in May, 1906, the Aldermanic permit was revoked by the New York Municipal authority. Therefore, the record shows, as already stated, that not a dollar was spent by the Lines Company under the license or permit referred to. The money spent in litigation was spent in hostility to the licensor; the outlay for experiments was probably expended in deciding whether or not the Lines Company would avail itself of the license at all, and if at all then on a theory antagonistic to the policy of the city. The opinion of the Court of Appeals in the case at bar says (201 N. Y., 330; *Record*, p. 417): "It is not pretended that the relator ever had a wire "strung or operated over the streets of the City, nor that "it had ever entered into any business of telegraphing, "telephoning or electric lighting." This is the fact as the record shows and as the State Court has necessarily found, and therefore there is no basis upon which this Court can adjudge an equitable estoppel against the City, based upon actual performance by the plaintiff-in-error.

The Lines Company is here claiming on an alleged

contract with the City of New York entitling it to lay wires in the City conduits for a telephone business; and it seeks to establish that contract by proof of acts done in the direction of experimenting for a conduit buiness of its own. This is far from the union of acts and minds which is necessary in such cases to establish an equitable contract obligation.

The suggestion of counsel for the relator that the formal written acceptance of the Aldermanic permit made by the plaintiff-in-error, April 16, 1883 (*Record*, pp. 60-61), might in any way tend to create a valid contract between the Lines Company and the City, is, of course, without legal or other foundation. The Aldermanic resolution being in effect, a mere license, the acceptance thereof, whether written or oral was acceptance thereof *as a license* and could not add anything thereto. Every license is intended to be accepted as a license merely, and that was this case. Nor is there anything in the language of the acceptance to affect the situation. It recites that the permit contains certain requirements, and in substance accepts it with the said requirements (fols. 182-183). And this was a matter of course, otherwise there would be no acceptance at all. It was a revocable license with conditions and still remained in its nature revocable after acceptance with the conditions. The language in some of the books to the effect that a municipal permit ceases to be revocable after it is accepted refers to acts of acceptance, meaning performance; and is merely a loose way of stating the undeniable fact, that a licensee may so act with the concurrence of the licensor as to acquire in equity, irrevocable rights. But such rights do not depend upon the permit, but upon the acts of the parties, following the granting of the permit. In this case there were no acts of performance, but on the contrary undoubted acts of abandonment by plaintiff-in-error and of revocation by the City following such abandonment.

POINT III.

But, assuming that such a contract as is claimed here had been in fact made between the City of New York and the plaintiff-in-error, and broken by the City, the remedy, under the circumstances, would be for money damages only; it certainly would not be mandamus against the subway company.

The claim here of the plaintiff-in-error is really for breach by the City of New York of an executory contract. It claims that its contract rights have been impaired by the action of the Municipality of New York in revoking its unexecuted permit or license to lay wires in the streets. The contract referred to is not, however, to be found in the permit itself, which is, on its face, without consideration and a mere revocable license; but is claimed to have arisen in consequence of an outlay of considerable sums on the part of plaintiff-in-error, made on the strength of this permit. Manifestly the remedy in such a case is a suit for money damages against the City of New York.

The contract clause of the Federal constitution does not enlarge the rights or remedies of parties. The Constitution gives plaintiff-in-error no rights in the streets of New York. It fixes no remedy for a breach of contract to enter those streets. The sole effect of the provision therein forbidding Legislative impairment of contracts, is, applied to such a case as this, to make the contract valid and enforcible. The *remedy*, however, is not fixed by the Constitution in this case any more than in a case of a bond or a promissory note. As this is a mere case of such a breach of contract as may properly be compen-

sated in damages, the plaintiff-in-error is confined to its action therefor.

Memphis v. *Brown*, 20 Wall. 289.

The claim of plaintiff-in-error for a mandamus herein ignores the fundamental difference between remedies upon executory and executed contracts; between a case where a plaintiff seeks to retain possession already acquired under a contract and that of one who merely seeks damages for the refusal to give such posesssion.

The appropriate remedy in this case, if any, is money damages; in the Cumberland Telephone case it was an injunction. The Lines Company is not in the situation of the *Cumberland Telephone and Telegraph Company*, in the Louisville case, (224 U. S., 649) where the Company being already in possession of its actual franchise and of its franchise property, and operating the same, was seeking to defend interference therewith, and obtained an injunction for that purpose. That Company was in the position of any party who has obtained possession of property under an executed contract. In this case the Lines Company never did obtain possession of the streets of New York or of any part thereof, nor did it ever operate its franchise. The money expenditure, which it claims to be the basis of its alleged contract rights, was made, as it claims, in securing inventions and patents, in manufacturing and testing insulated wires, conduits and other appliances; in making plans for conduits, and in ill-advised litigations, etc. (*Record, Wilson*, fol. 46, 50-51), and not at all in laying wires or operating telephones in the streets of New York or in any work directly included in its permit. It had no property or easement in the streets of New York on the day it commenced this proceeding nor at any time before or since. In the *Cumberland* case on the contrary the contract of the Company to erect and operate telephones had been executed;

a large bond had been given; it had furnished police and telegraphic service free of charge for twenty-two years; it had enlarged the telephone system at an expense of over $1,000,000; it was in the streets and had property therein and possession thereof, and the voluntary wrongful action of the City of Louisville would have caused it irreparable damage. The distinction between that case and this is manifest. That was a suit to protect possession of valuable property; while this is a claim of damage done by breach of contract. A similar argument applies in the Owensboro case (230 U. S., 58).

At no time since the permit was granted could plaintiff have maintained a suit against the City for specific performance of its alleged rights to lay wires in the streets of New York. Such a suit would have been dismissed on the ground that the remedy, if any, was at law for damages on the grounds above stated. And if so therefore *a fortiori* mandamus will surely not lie against this private corporation for the same object. Such a suit would also have been dismissed if brought in 1910 when this proceeding was instituted on the ground of the gross *laches* of the plaintiff-in-error in bringing the same, and because of the change in circumstances since its rights, if any, accrued.

Dorsey v. *Packwood,* 12 How. (U. S.) 126,
United States v. *Noe,* 23 How. (U. S.) 312,
Rutland Marble Co. v. *Ripley,* 10 Wall 339.

In the *Noe* case, *supra,* the Court said (p. 315):

"It is a general principle of equity to grant a decree "of specific performance only in cases where there is a "mutuality of obligation, and where the remedy is mu- "tual, and that it will not be rendered in favor of one "who has been guilty of an unreasonable delay in ful- "filling his part of the engagement, *or who has slept for "a lengthened period on his rights,* and comes forward at "last when circumstances have changed in his favor to en- "force a stale demand."

This is certainly a stale demand and the record shows the great change in the telephone situation in the City of New York in the last thirty years, of which the Court can perhaps take judicial notice. It is certain that the Board of Aldermen in 1883 did not suppose it was giving plaintiff-in-error a twenty-seven year option to use the streets or not at its pleasure. Yet that is practically what is claimed by plaintiff-in-error in this case.

The writ of mandamus is not an appropriate remedy in this case. The writ of mandamus is even farther than a suit for specific performance from being an appropriate remedy for the breach of contract alleged by plaintiff-in-error here. Mandamus also does not lie where the party aggrieved has another adequate remedy.

Cox v. *United States,* 9 Wall., 298,
Re Barksdale, 112 U. S. 177.

Here the remedy in damages against the City is adequate and appropriate.

And the writ is only granted where the right is clearly established and the duty peremptory.

United States v. *Lamont,* 155 U. S. 303.

Here there is no clearly established right, nor peremptory duty. The defendant, the Empire City Subway Company, was under no clear duty to receive the wires of the plaintiff-in-error on an unadjudicated claim of a stale franchise resting in estoppel *in pais.* The claims of the plaintiff-in-error being fairly in dispute with the City, the Subway Company was under no obligation to recognize them, but the contrary. As already stated, this appeal can only be sustained upon its being established not only that the contract rights of plaintiff-in-error have been wrongfully impaired in violation of the Constitution of the United States; but also that mandamus against the defendant-in-error is the appropriate remedy which does not appear to be the case here.

POINT IV.

The Aldermanic Permit was not a license to do what the New York Electric Lines Company now seeks authority to do, but something substantially different and not within the intention of the parties to the permit, nor within the language thereof.

The object of the Lines application in this proceeding is stated in its initial notice of motion to be as follows (*Record*, pp. 8-9): "A peremptory writ of mandamus to "be issued out of and under the seal of this Court, di- "rected to the Empire City Subway Company, Limited, "requiring it to accord and provide space in its sub- "ways in the City of New York, for the purpose of plac- "ing therein electrical conductors, together with the "necessary laterals and connections for block and build- "ing distribution, in accordance with the said applica- "tion, made by the said New York Electric Lines Com- "pany on or about the 7th day of June, 1910, and requir- "ing said Empire City Subway Company, Limited, to "forthwith give and provide every facility to the said "New York Electric Lines Company, to place its wires "under the streets and in proper conduits to be furnished "by the said Empire City Subway Company, Limited, in "each part of the territory referred to in said applica- "tion."

The application referred to (*Exhibit H, Record* p. 70) is similarly for space in the subways of the Empire City Subway Company. The notice of motion does not give the purpose for which these wires are to be used, but the application states that they are for telegraph and telephone operation (fols. 213, 218), "to be used by it in "furnishing electric energy for the transmission of tele-

"graphic and telephonic messages." The affidavit of Secretary Wilson of the Lines Company on which the application was made states (fol. 31), and it is an undoubted fact that the Empire Company is charged with the obligation of providing space in its subways not for all companies, but only for companies having lawful power to operate telegraphic or telephonic conductors in any streets of the City of New York, whenever any of such companies shall apply for the same.

Now the Aldermanic permit which is the basis of this application gives in terms no license to enter City conduits or subways, and no lawful power to operate telephones. Its language is as follows (fol. 172): "Resolved "that permission be and hereby is granted to the New "York Electric Lines Company, to lay wires or other "conductors of electricity in and through the streets, "avenues and highways of New York City, and to make "connections of such wires or conductors under ground "by means of the necessary vaults, test boxes, and dis-"tributing conduits, and thence above ground with points "of electric illuminations or of telegraphic or telephonic "signals." There is no reference here to civic conduits or subways nor is any permit given to lay wires in subways or conduits belonging to anyone else, nor is there any permission to establish or carry on a telephone or telegraph business or to lay wires for the purposes of any such business. Nor can the meaning of this permit be fairly extended by any theory of original intent so as to include what it now desires to obtain, because such was not the original intent. The facts heretofore stated in this brief as they appear in the record in this case, show satisfactorily that this permit was originally intended to provide for the laying of wires in the Lines Company's own trenches or conduits, said wires to be leased by it to other operating telephone and telegraph companies. The permit itself (fols. 177-178) refers to the rental of wires

by the Lines Company; and the declarations of its officials, the documents in the case, and all claims, affidavits and pleadings made by the Company in the numerous litigations which were brought to secure the privileges it claimed under this permit, make it clear that its interpretation of this permit was that it authorized subway constructions by the Lines Company.

In the *Squire* mandamus proceeding, which came to this Court and is of record here (145 U. S., 175), the sworn petition of the Lines Company, verified September 21, 1886, by its president Shelbourne, says, in paragraph 1 thereof, "but your petitioner has never operated or "intended to operate electrical conductors, its intention "having always been, and still being, to lease to other "persons, natural or corporate, all of its electrical con- "ductors, and not to operate itself any of such conduc- "tors or other electrical conductors."

It is probable that the plaintiff-in-error originally intended to justify its claim to subway construction as technically incidental to the right to lay wires, because the language of the statute then existing did not include subway construction as one of the objects for which telephone companies could be formed; but the intention of the permit, and of the relator in accepting it is plain from the record, namely, the creation of a system of underground conduits which the Lines Company hoped to turn into a speculative monopoly for its benefit. This is recognized in the opinion of the New York Court of Appeals in the present case as follows (*Record*, p. 417): It will thus "be observed that the main purpose of the relator's incor- "poration and of the permit granted by the City was to "construct underground passages for the laying of wires "or electrical conductors for the purpose of renting to "persons or corporations having the power to conduct "the business of electric lighting, telegraphing or the "maintaining of telephonic communication." The New

York Court of Appeals further says that this permit ought not to be interpreted as a permit to lay wires for the purpose of telegraphic operation in the streets and conduits, because at the time it was granted there were no city conduits in existence or contemplated, and everybody supposed this permit to be for an entirely different purpose. The Court says (p. 418): "In view of the fact "that the relator has never attempted to engage in the "business of electric lighting or of supplying transmit-"ters and receivers for telephonic communication, or of "instruments for telegraphing, and has never been "granted a franchise to occupy the conduits therefor, "the contention that it may now do so under the old "resolution of the common council of 1883, we think "would be giving to it powers not embraced in or con-"templated by the resolution and should not be now "adopted or sanctioned."

The plaintiff-in-error may say that the companies having franchises to string or lay and operate wires below or above ground were afterwards compelled, and therefore became entitled, to use the City conduits; and this we concede. What we say is that this is not an ordinary permit to lay telephone or telegraph wires, and that neither the language of this particular permit nor its interpretation by the parties at the time, included the ordinary case of a telephone company desiring to construct and operate wires for its business, which is the case in which the Lines Company now erroneously claims itself to be.

We respectfully ask the Court in the reading of this permit to apply the well-established rule that grants of public franchises are to be interpreted most strongly against the grantee and in favor of the grantor.

Cleveland Electric Co. v. *Cleveland,* 204 U. S., 116; 129;

Stein v. *Bienville Water Supply Co.* 141 U. S., 67;
Cornell v. *Coyne,* 192 U. S. 418;
Penn, R. R. Co. v. *Canal Comrs.,* 21 Pa. St. R., p. 9;
Syracuse Water Co. v. *City of Syracuse,* 116 N. Y., 167;
Joyce on Franchises, Sec. 254.

POINT V.

The Aldermanic Permit of 1883 had the qualities of a revocable license and was put an end to by non-user and abandonment on the part of the licensee and by acts of implied revocation by the City, the Licensor; and if any force therein remained in 1906, the same was finally and in due form then terminated by the resolution of revocation of the Board of Estimate and Apportionment.

The facts and argument under this head may be thus summarized:

A. *As to abandonment*: The Lines Company never used its permit for the purposes of a telephone business nor attempted so to do for a period of twenty-eight years after its incorporation, namely, from 1882 to 1910. Not only this, but when in 1885 and 1886 the present subway system was established, the Lines Company neglected and refused then and for over twenty years afterwards to apply to the proper Commissioners for a place in the system, or to file the map required by statute to entitle it to such a place. The permit or license thus became

first dormant and then extinct, and must be deemed to have been finally abandoned by the licensee.

B. In 1885, the permit never having been acted on, was practically annulled and revoked by the New York City and State authorities by the establishment of the subway system which was totally inconsistent with the relator's permit to lay its own wires in its own trenches or conduits. This amounted to revocation of the permit at common law as applied in this very case by the New York courts.

C. In this annulment or revocation the Lines Company virtually acquiesced, first in 1886, by open repudiation of all desire to operate electrical wires, and subsequently by continuous silence on the subject, and is now therefore estopped from questioning the same.

D. In 1906 the permit was formally revoked by the New York Board of Estimate and Apportionment, which had lawful authority for that purpose.

The Lines Company never used its aldermanic permit for the purposes of a telephone business nor attempted to do so prior to the institution of these proceedings, a period of twenty-eight years from its incorporation. There is no need to further argue the proposition that the New York Electric Lines Company never performed any of the functions of a telephone or telegraph company in New York City and never had the plant or equipment therefor or any part thereof, for it makes no pretense of having done so, and the facts are set forth fully and in detail in the statement of facts in this brief, with references to the record on that point. The State Court so found and their decision was largely based on that finding. The Court of Appeals says (*Record,* p. 417) "It is "not pretended that the relator ever had a wire strung or "operated over the streets of the City, nor that it had "ever entered into any business of telegraphing, tele-"phoning or electric lighting." The evidence on that

subject has been collated in this brief and is to the effect that for a period of twenty-eight years prior to this proceeding,—that is from 1882 to 1910,—the Lines Company not only never operated wires for a telephone system, but it never tried or intended to do so, nor had it either plant or subscribers, means or credit for that purpose.

The license became extinct after being dormant for more than a reasonable time. This permit was not in its terms r in its nature eternal. No time was fixed for performance, but in the nature of things, like any other license, it was intended to be performed within a reasonable time.

Gilmore v. *Wilbur,* 12 Pick (Mass.), 120; 22 Am. Dec., 410;
Hill v. *Hill,* 113 Mass., 103; 18 Am. Rep., 455;
Parsons v. *Camp,* 11 Conn., 529.

In *Hill* v. *Hill, supra,* a parol license to cut away growing wood where no time was mentioned, was held to have expired and to be unenforceable because not executed within a reasonable time. The Court said: "The right "claimed by the plantiff would deprive the defendant of "the full use and enjoyment of his land for an indefinite "time," and this was held to be an unreasonable construction of the license. In like manner the right claimed by the Lines Company here would deprive the City of the use of the streets for an indefinite time. The Lines Company was never legally authorized to act the part of the dog in the manger. The relator's claim here seems to be that this license to occupy the streets of New York would never expire no matter what changes might take place in the streets, their condition or management, or what development in the art of telephoning or electrical communication; no matter what the growth of the City, no matter about anything; all else might change and decay, only

the permit of the New York Electric Lines Company was in its nature eternal. This claim is preposterous. This permit to the Lines Company, if neglected, must sometime die a natural death; and surely it could not live from 1883 to 1910, a period of twenty-seven years, without food, raiment or exercise.

The deliberate failure of the Lines Company to make use of the permit to lay or operate telephone wires amounted in law under the circumstances here shown to a waiver or abandonment of the same. There was nothing between 1883 and 1886 to hinder the Lines Company from commencing the laying of its wires and establishing its telephone system; in 1886 there was nothing to hinder it going into the new subways with the other companies. Its neglect and refusal for years to exercise its permit went far beyond a reasonable delay.

Considering all the circumstances, including the well-known fact of which the courts will take judicial notice that construction under such contracts is usually begun within a few weeks or months at most from the time of the grant or license; and considering further the urgent necessity of an underground telegraph system at a time when, as it is well known, the overhead wires had become a dangerous nuisance; and considering further the legislative provision, long before that in force in the City of New York, to the effect that a corporation franchise became defunct in one year in case of non-user, it may well be insisted that one year from the grant of the permit was more than a reasonable time within which the Lines Company should have begun operation of telephone wires thereunder in at least some part of the City.

That the licensee may abandon the license by neglect to avail himself of it, is well settled.

Curtiss v. *Hoyt*, 19 Conn., 169.

By acting for over twenty years as though it had no

claim of a franschise to lay wires in the subways the Lines Company abandoned such claim.

Cumberland Co. v. *Evansville*, 143 Fed. R., 238.

Disuse of a franchise or an easement for a long period constitutes an abandonment thereof.

Henderson v. *Central Pass. R. Co.*, 21 Fed., R., 358;
Louisville Trust Co. v. *Cincinnati*, 76 Fed., 296;
Corning v. *Gould*, 16 Wendell (N. Y.), 531;
People ex rel. Nelson v. *Marsh*, 82 N. Y. App. Div., 571; affd. 178 N. Y., 618.

Abandonment of Permit for Telephone Operation Shown by Failure to File a Map with the Subway Commissioners. Not only did the Lines Company neglect to use the permit, if such it had, to lay or operate telephone wires, but it clearly manifested its intention to waive or abandon that feature of the permit by its failure to file with the Commissioners of Electrical Subways the map which was a necessary prerequisite to its use of electrical subways. The Statute of 1885, Chap. 499, provided, Sec. 3:

"When any company operating or intending to oper-
"ate electrical conductors in any such city shall desire
"or be required to place its conductors or any of them
"underground in any of the streets, avenues or other
"highways of any such city, and for that purpose to re-
"move the same from the surface thereof, and shall have
"been duly authorized to do so, it shall be obligatory upon
"such company to file with said Board of Commis-
"sioners a map or maps made to scale showing the streets
"or avenues or other highways which are desired to be

"used for such purpose and giving the general location, "dimensions and course of the underground conduits de- "sired to be constructed. Before any such conduits shall "be contructed it shall be necessary to obtain the ap- "proval by said board of said plan of construction so "proposed by such company; and said board has and "shall have power to require that the work of removal "and of constructing every such system of underground "conductors shall be done according to such plan so ap- "proved, subject at all times to such modifications as "shall from time to time by the board be made, and sub- "ject also to the rules and regulations not inconsistent "herewith, prescribed or to be prescribed by the local "authorities having control of such streets, avenues or "other highways of such city."

We have already set forth in the statement of facts the means taken by the State and City of New York to enforce this salutary provision; that the Board of Commissioners of Electrical Subways was created and a subway system established and the telephone or low tension branch thereof placed in charge of the defendant, the Empire City Subway Company. It was intended by this Act that all applicants for the use of the subways should furnish the Commissioners with a map as provided therein showing the streets where such company intended to operate, the location of the necessary conduits, etc. Without such information it is evident that no practical system could have been devised by the Commissioners; and it was and is a perfectly fair inference that any telegraph or telephone company neglecting to file such map and apply for a place in the subways virtually abandoned or waived any claim it might have to street use. The constitutionality of this Act has been affirmed by the courts of New York and by this Court in the *Squire* case (145 U. S., 175), and it was practically decided in that case that whatever rights any company had to lay wires

in the city streets were properly modified by the provisions of that statute and could be exercised only in conformity therewith.

That this map was never filed is the positive testimony of Mr. John H. Cahill (*Record,* fol. 457); and his statement is nowhere controverted either by the production of the said map or of any record of the filing thereof. The failure to file this map by the plaintiff-in-error was due to its hostility to the whole subway scheme and its insistent claim that the subway act was unconstitutional and void, and was one of the grounds of the decisions against it in the New York courts, as stated in their opinions (*see Opinion of Judge Allen, Squire case,* 14 Daly, 157; 159, 165; *Opinion Ruger, C. J.,* 107 N. Y., 598, 599; *Opinion Judge Ingraham,* 115 App. Div., 261).

The refusal by the Lines Company to comply with the provisions of the statute was in effect a refusal to exercise any right to street use in the cases provided and amounted to an open abandonment of the same.

The Permit never having been acted upon, was practically revoked by the action of the State and City Authorities in 1885 inconsistent therewith. The law is well established that a license, whether granted by writing or by parol, may be revoked at any time without formal notice to the licensee, by the doing of any act by the licensor evidencing an election to revoke the license.

Hyde v. *Graham,* 1 Hurlstone & Coltman, 593.

Coleman v. *Foster,* 1 Hurlstone & Norman, 37.

Wood v. *Leadbitter,* 13 Meeson & W., 838.

Eckert v. *Peters,* 55 N. J. Eq., 379.

Wiseman v. *Lucksinger,* 84 N. Y., 31.

Jackson v. *Babcock,* 4 John (N. Y.), 418.

Cronkhite v. *Cronkhite,* 94 N. Y., 323.

Johnson v. *Skillman,* 29 Minn., 95.

Prince v. *Case*, 10 Conn., 375.
Wilson v. *St. Paul R. Co.*, 41 Minn., 56.
Kamphouse v. *Gaffner*, 73, Ill., 453.
Eggleston v. *N. Y. N. Co.*, 35 Barb., 162.
Bruley v. *Garvin*, 105 Wis., 625.
Minneapolis v. *Marble*, 112 Mich., 4.
Taylor v. *Gerrish*, 59 N. H., 569.

This permit was revoked as early as 1885 by the act of the Legislature in conjunction with the municipal authorities of the City of New York in establishing the new subway system under the act of that year. For the Aldermanic permit of 1883, even if it conferred a license to lay wires as part of a telegraph system, which we deny, conferred such right *in the streets as they then existed*, without conduits or subways, which were to be built by the Lines Company for itself. It did not contemplate a civic subway system. Therefore the creation of the present subway system was inconsistent with that unexecuted license and annulled and revoked it, and the State Court has so decided in this very case. The Court of Appeals in its decision (Record, page 418), referring to the establishment of the Municipal subways says: "The legislature, therefore, has itself practically annulled the resolution passed by the common council giving the relator a permit to construct underground subways for electrical wires or conductors, and its power so to do has been affirmed, as we have seen, not only in this court, but in the Supreme Court of the United States." (*Matter of New York Electric Lines Co.*, 201 N. Y., 330.)

At that time (1885) the Lines Company had done nothing at all openly or to the knowledge of anybody interested to justify its existence. It now says that it had been performing secret experiments. Now, unless this Court is prepared to hold that a gratuitous licensee can hold his license forever despite the licensor, and even to

his detriment, by performance of experiments secretly and without the licensor's knowledge and consent, then it must be that the licensor may at some time revoke the license. And may not two years' delay be enough under the circumstances in this case? The State Courts say that as a matter of fact and law the right to revoke existed after two years' inaction. We submit that this Court will not overrule the State Courts in a question of that kind involving a mixture of law and fact.

The relator, Lines Company, tacitly and openly acquiesced in the virtual annulment by the governmental establishment of the subway system in 1886 of any claim it might otherwise have had to lay or operate telephonic wires in the City subways. The City and State authorities having by the governmental establishment of the subway system in 1885 and 1886 assumed to annul or revoke all outstanding permits for laying wires such action became binding on the plaintiff-in-error long before 1910 when it began this proceeding because of its failure to protest and its apparent acquiescence.

Gregg v. *Von Phul*, 1 Wall., 274.

The Lines Company was bound to demand and enforce whatever rights it had within a reasonable time after its permit was revoked and annulled by the acts of the City and State authorities inconsistent therewith, in the creation of the present subway system. If the Lines Company claimed a right to establish a telephone system in New York State it was bound to say so. It claimed no such right. It misled the City. It claimed instead the right to lay subways, a different thing altogether. It could not stand by for twenty-four years after these acts of revocation or virtual annulment, and at the end of that time make its election to lay and operate wires. Even if merely silent it should be deemed to have acqui-

esced by its silence and inaction in the perfectly justifiable assumption by the City authorities that it made no claim whatever of any right to lay wires in the City subways or to do aught else than build subways and lease wires as incident thereto. But it was not merely silent. For the Lines Company had, in 1886, in the most solemn manner and under oath, openly repudiated any claim to operate a telephone system. In the *Squire* mandamus proceeding which reached this Court (145 U. S., 175), the petition which is of record here, verified September 21, 1886, by the President of the Lines Company states in Paragraph 1 thereof, "but your petitioner has never "operated or intended to operate electrical conductors, "its intention having always been, and still being, to "lease to other persons, natural or corporate, all of its "electrical conductors and not to operate itself any of "such conductors or other electrical conductors." Now the use of the electrical subway system was by statute for obvious reasons confined to "companies having law-"ful power to operate telegraph or telephone conductors "in any street in the City of New York," as appears by the relator's petition in this case (*Record*, fol. 31). By its open and avowed refusal to operate therefore, the Lines Company practically gave notice in 1886 that it waived all claim or intention to enter those subways at all.

The formal revocation in 1906. As to the formal revocation of the permit in 1906 by the Board of Estimate and Apportionment, representing the City of New York, its validity is based upon the grounds set forth in the resolution of revocation itself, that the Lines Company had failed and neglected to construct subways and to lay wires for over twenty-three years; and also upon the propositions that the license was in its nature revocable, and that no contract or contractual status had been

created giving permanent rights in the streets to the Lines Company.

The revocation was authorized and legal. There is no doubt of the power of the Board of Estimate and Apportionment to pass such a resolution. By the New York City Charter, Sec. 242, as amended by Chap. 269, Laws 1905, this Board was given control of all the streets, highways and public grounds of the City; by Sec. 243 it was given the powers relative thereto formerly vested in the Board of Street Openings, and by Sec. 41 its was expressly provided that all city ordinances affecting or relating to grants, franchises or contracts, or resolutions in the nature of a franchise, theretofore or thereafter made, granted or adopted, should be subject to modification, amendment or repeal by the Board of Estimate and Apportionment. The revocation, therefore, had the same effect as if made by the State Legislature itself, differing in this respect from what was done in the *Cumberland Telephone* case.

The New York Courts sustained the validity of this revocation in the *Ellison* case (115 N. Y., App. Div., 263). Judge Ingraham there said:

"But it cannot be that a municipal corporation, hav-
"ing given its permission, is bound hand and foot so that
"the permission can never be revoked, although the cor-
"poration neglects to act under it and construct its lines
"for such a period as would divest a person of real prop-
"erty by adverse possession. All of the elements of a
"contract are wanting. The relator assumed no obli-
"gation whatever in relation to the construction of the
"subway. All it ever agreed to do was that when it built
"the subway it would comply with the conditions im-
"posed. Until the permission granted was accepted by
"some act of the corporation under it I think there was
"no contract. If the relator had agreed to construct

"these subways within a specified time a different ques-
"tion would have been presented, but in all the cases
"where these grants of franchises have been held irre-
"vocable it was because there was an obligation to con-
"struct the thing granted or the grantee had acted under
"the grant and had constructed it. In those cases a con-
"sideration would be apparent. The relator had not
"acted under the permission granted by the common
"council. No subway has been built, and, as I view it, no
"right was acquired that was not subject to legislative
"control."

The opinion of Judge Haight of the New York Court of Appeals (Court of last resort) in the present mandamus case (201 N. Y., 321, 332, 334) refers approvingly to Judge Ingraham's opinion, and further says:

"During the preceding generation, franchises in the
"streets of our cities were considered of but little or no
"value and were readily given away to those promising
"public service benefits. Now they have become of im-
"mense value and the public have become deeply inter-
"ested in having and enjoying the benefits derived
"therefrom. We have, therefore, called attention to the
"more recent decisions of our courts for the purpose of
"showing their tendency with reference to the granting
"away of the rights of the public, especially so far as
"our streets and highways are concerned. And why are
"they not right? Should a public service corporation be
"permitted to acquire an irrevocable franchise by mere
"acceptance, without spending a dollar by way of per-
"formance, and then hold up the public in its enjoyment
"of the privileges contemplated by the grant indefi-
"nitely, or until they can be bartered away for a fortune?
"Should the municipalities to whom the legislature has
"delegated the right to grant permits for the use of their
"streets for public service purposes be denied the power

"to revoke licenses granted in case of failure of the "grantee to render substantial performance? We think "not. No reasons for the deprival of the municipalities of "such power are suggested and none are apparent to our "minds. We, therefore, incline to the view expressed by "the trial court that the mere granting of a permit by "a city to a corporation to use the streets for a purpose, "is a license merely, revocable at the pleasure of the city, "unless it has been accepted and some substantial part "of the work performed contemplated by the permission "sufficient to create a right of property and thus form a "consideration for the contract. We, consequently, con- "clude, under the circumstances of this case, that the "Board of Estimate and Apportionment had the power "to and did revoke the permit granted to the relator "under date of April 10th, 1883."

No language of ours can add to the clearness and strength of these statements by the New York courts They contain a statement of the law as it is, as it should be and as it must be, if municipalities are to be protected from some of the worst abuses consequent upon the careless granting of street franchises.

POINT VI.

This whole controversy was passed upon in this Court and in the New York State Courts long prior to this proceeding and decisions rendered adverse to the New York Electric Lines Company both in the Squire case and in the Ellison case.

A further illustration of the impropriety of attempting to adjudicate this controversy here without the presence of the City of New York is found in the fact that the same has already been twice passed upon adversely to plaintiff-in-error in proceedings to which said City was, in fact, a party.

The *Squire* case was first, and arose on a mandamus application by the New York Electric Lines Company against Rollin M. Squire, as Commissioner of Public Works of the City and County of New York. The record is in this Court, where the case was decided in 1892 (145 U. S., 175). This whole controversy was before the court at that time and might have been litigated therein; and if the claims of the Lines Company were not then properly argued or presented it was because that Company did not choose to then urge them, having evidently no faith therein or preferring an inconsistent position. The present claim is a mere afterthought of the kind to which the courts refuse a hearing for the reason that parties are bound when they come to court on a particular controversy to make their claims therein once and for all.

The petition of the plaintiff-in-error in the *Squire* case may be referred to because it is part of the records of this Court. It claims the grant by the City to the Lines

Company of "franchise of *laying wires or other con-*
"*ductors* of electricity in and through the streets, ave-
"nues and highways of New York City and of making
"connections of such wires or conductors underground,"
etc., and that "your petitioner immediately proceeded
"to make ready its material and plant for *the construc-*
"*tion of its electrical conductors* and underground lines
"in the City of New York and to develop and elaborate
"its mechanical constructions for the same", etc. and
alleges its outlay in the premises. It recites the appli-
cation to the respondent Squire for a permit "for the
"purpose of *laying your petitioner's wires and other*
"*conductors* of electricity and of making connections with
"the same in accordance with the benefits and conditions
"of its said franchise." There is of course more in the
petition of eight pages which we do not need to recite
here. It is sufficient to say that the entire Aldermanic
permit was before the Court in that matter and the
foundation of the present claim of the plaintiff-in-error
to lay wires in the streets of New York was expressly
alleged. That petition was verified September 21st, 1886,
which was more than a year after the passage of the law
of 1885 providing for the electrical subways. The Lines
Company had then, if ever, a right to enter the subways
based upon its permit and its alleged outlay thereunder;
and all the essential facts now presented here, were pre-
sented then or should have been presented by the Lines
Company to the Court. The decision therefore in that
case denying the mandamus was an adjudication not only
upon what was then urged upon the Court, but upon
every point that could or might have been litigated in
that case.

The *Ellison* case which was the second litigation and
was begun in 1905, did not reach this Court, the appeal to
this Court having been abandoned (214 U. S., 529); but it
is referred to by the plaintiff-in-error in the moving

papers (*Wilson's aff't.*, fols. 68-69). It is also discussed at considerable length in the brief filed by the plaintiff-in-error and therein treated as a binding decision. It is also referred to in the *Cahill* affidavit (fol. 483). It is therefore proper for us to discuss it here. In the *Ellison* case the Lines Company appears to have reduced its argument to a claim for the building of conduits or subways. But its permit and alleged franchise were then and there before the courts for examination and adjudication; and it did not then pretend that its permit was capable of division or represented two separate claims or rights, the one to lay subways and the other to lay and operate wires. Judge Chase of the Court of Appeals, who wrote the opinion for the Court in that case said in substance (188 N. Y., 530) that the Lines Company was never entitled to lay conduits except as an incident to the laying of wires. Whether that was so, or whether the laying of wires was incident to the laying of conduits, the two were always parts of one claim founded on one license or permit. In the *Ellison* case the New York Appellate Division held (115 App. Div., 258), as already stated, that the application for a mandamus was properly denied for the failure of the Lines Company to have its plans approved by the Subway Commissioners. And again (at p. 261) that its right to construct subways lapsed for failure to have those plans approved within sixty days. The same Court further held that the franchise had become extinguished because not acted on and that the revocation by the Board of Aldermen was valid. The Court of Appeals affirmed the judgment on the ground that its right to lay subways or conduits, the only right it was then urging, had in any case been extinguished by the Act of 1885. Judge Ingraham in this same case said in substance (115 App. Div., 257) that the record was substantially the same as the *Squire* case.

In neither case was it pretended that the Aldermanic permit was divisable or separable, or that the franchise

to build conduits was separable from that to lay wires. In both cases the rights of the Lines Company under its permit, whatever they were, were before the courts for adjudication; it was bound then to present whatever claims it had to the use of the streets of the City; and the decision having been adverse and no new circumstances having arisen favorable to its claims they must be considered as having been finally disposed of in these litigations. Such was then and is now the law of the State of New York as well as in this Court.

Griffin v. *L. I. R. R. Co.*, 102 N. Y., 449;
Lorrillard v. *Clyde*, 122 N. Y., 41;
Stockton v *Ford*, 18 How. (U. S.), 418;
Washington A. G. Packet Co. v. *Sickles*, 24 How. (U. S.), 333;
Beloit v. *Morgan*, 7 Wall, 619;
Dowell v. *Applegate*, 152 U. S., 327.

This rule of *res adjudicata* is a salutary one and should be enforced. The justice and expediency thereof are well shown in this case where the relator has kept up this controversy for twenty-eight years by the improper expedient of dividing up its claims upon the same transaction and speculating upon each one separately.

As Judge Nelson said in the *Stockton* case (18 How., 418): "The neglect of the plaintiff to avail himself of it, "even if it were tenable, furnishes no reason for another "litigation".

Judge Swayne said in the *Beloit* case, 7 Wall., 619, quoting approvingly the language of an English judge, "In trying this question, I believe I state the rule of the "Court correctly, that where a given matter becomes the "subject of litigation, in, and of adjudication by a Court "of competent jurisdiction, the Court requires the par-"ties to bring forward their whole case, and will not,

"except under special circumstances, permit the same "parties to open the same subject of litigation in respect "of a matter which might have been brought forward as "a part of the subject in contest, but which was not "brought forward only because they have from negli- "gence, inadvertence, or even accident omitted a part of "their case."

It is perfectly clear that this matter now before this Court is one which, as Judge Swayne there said, might have been brought forward as part of the subject in contest in either the *Squire* or the *Ellison* case. The *Squire* case was begun in September, 1886, over three years after the grant of the Aldermanic permit in question; the *Ellison* case was commenced in 1906, twenty-three years thereafter. In September, 1886, the essential facts now presented were known; the Aldermanic permit of 1883; the Subway Legislation of 1885; the adoption of a subway plan and the commencement of construction work thereunder. The alleged outlays by the Lines Company constituting the contract had then been made, if ever. In 1906, when the *Ellison* case started all these matters were old and historical. The claim to a place in the subways might have been litigated in either case. The legal facts in all three cases are substantially the same. This proceeding is brought upon the charter of incorporation of the Lines Company, its Aldermanic permit and alleged operations thereunder for the purpose of establishing its franchise in the streets of New York. So were the *Squire* and the *Ellison* cases. The fact that there is now an electrical subway system with a company in operation thereof is according to the theory of the plaintiff-in-error itself quite incidental. It wants to lay wires in the streets for telephone purposes, subway or no subway. Under its theory here the use of the electrical subways whether its own or the City's are mere incidents of that right. Therefore the litigations are the same; the same

in purpose, scope and object. The only distinction attempted is that plaintiff-in-error now lays stress on its early operations under its permit as creating an alleged irrevocable contract with an estoppel against the City. But this transaction if it took place might have been and should have been brought forward in the prior proceedings; and that there was no such contract with the City as here and now alleged must be conclusively deemed to have been established both in the *Squire* and *Ellison* cases.

POINT VII.

Other considerations requiring an affirmance of the order.

The record herein shows that the questions attempted to be raised upon this writ of error were not necessarily controlling in the State courts and that the decision may have gone against the plaintiff-in-error on other questions besides the Federal question which it attempts to present here. Under these circumstances the order should be affirmed. The following are some of the points thus referred to:

1. That this permit or license was necessarily subject to reasonable statutory regulation; that the subway system was a part of such legislation. That included in the legislation on the subway system was the N. Y. State Act of 1892, Chap. 263, providing that no permit to open streets for underground construction should be granted unless there is an existing demand for the construction of such conduits or subways; nor unless the occupation of such conduits or subways is reasonably assured and the public interests require the construction thereof. The record does not show that there was any such public demand as the statute required, but the contrary and therefore the writ of mandamus was properly denied.

2. The plaintiff-in-error lost its rights, if any, by *laches* and the statute of limitations.

3. The application was not made in good faith and the plaintiff-in-error was not the real party in interest.

As these questions and each of them might and should have been decided against the plaintiff-in-error in the State court it is not clear that there was any contravention of the Federal Constitution in the State courts and the judgment should be affirmed and the writ dismissed.

Klinger v. *State of Missouri*, 13 Wall., 257.

POINT VIII.

The writ of error should be dismissed or the order appealed from should be affirmed.

This is the first time that an attempt has ever been made to create a franchise by mandamus. To decide on a mandamus proceeding by one private corporation against another, that a mere permit, over thirty years old, granted by a defunct Board of Aldermen, and which has never operated, is a valuable living franchise in the streets of New York, would be to say the least, astonishing; to give such a judgment without citing or hearing that City would be unprecedented. What the plaintiff-in-error really asks is that this Court for its benefit actually create a franchise or perform the miracle of raising one from the dead; for that it what this proceeding amounts to.

If that can be done; if this old permit can be dressed up and given life as a new franchise, and forced upon the

City of New York, against the apparent desire and judgment of its local courts and authorities, then we may fairly expect to see a new and flourishing business in hunting up and reviving old aldermanic ordinances all over the United States. It is well known that in the days when this permit was given, similar ordinances were freely passed in every City in the land; hundreds whereof were never acted upon to the knowledge of anyone. Should this experiment succeed we may expect a crop of similar applications all over the country. This would be a sad blow to those who are endeavoring to further civic reform in such matters.

Dated, New York, October Term, 1914.

ALFRED B. CRUIKSHANK,
Of Counsel for
Clifford L. Middleton, *amicus curiae*.

Supreme Court of the United States

1

THE NEW YORK ELECTRIC LINES COMPANY, Plaintiff-in-Error, *against* EMPIRE CITY SUBWAY COMPANY, Defendant-in-Error.	October Term, 1914. No. 63. Notice of Motion.

PLEASE TAKE NOTICE, that on the annexed affidavit of Alfred B. Cruikshank, verified October 13th, 1914, the undersigned will move the Supreme Court of the United States at the Capitol, at Washington, on Monday, the 19th day of October, 1914, at twelve o'clock, noon, or at the coming in of the Court on that day, for leave to file and submit a brief in the above-entitled cause, as *amicus curiae* and for an order granting such leave and for such other and further relief as may be just. 2

Dated, New York, October 13th, 1914.

Yours, etc.,

ALFRED B. CRUIKSHANK.

To 3

J. ASPINWALL HODGE, Esq.,
Attorney for Plaintiff-in-Error.

BLANDY, MOONEY & SHIPMAN, Esqs.,
Attorneys for Defendant-in-Error.

SUPREME COURT OF THE UNITED STATES.

1

THE NEW YORK ELECTRIC LINES COMPANY, Plaintiff-in-Error, *against* EMPIRE CITY SUBWAY COMPANY, Defendant-in-Error.	October Term, 1914. No. 63. Affidavit on Motion of C. L. Middleton for leave to file brief as *amicus curiae*, etc.

STATE OF NEW YORK, City and County of New York, } ss.:

2

ALFRED B. CRUIKSHANK, being duly sworn, says: I reside at Nyack, Rockland County, New York. I am an attorney and counselor at law and a member of the firm of Atwater & Cruikshank, lawyers, practicing at 43 Cedar Street, New York City. I am a member of the Bar of the Supreme Court of the United States and have been such member for over thirty years.

On behalf of my client, Clifford L. Middleton, of the City of New York, I desire to submit to the United States Supreme Court a brief as *amicus curiae* in the case, Number 63 on the 1914 October Calendar, now pending in said Court, entitled The New York Electric Lines Company, plaintiff-in-error, against Empire City Subway Company, defendant-in-error, and which case is likely 3
to be heard in the next few weeks in that Court. The attorney for the plaintiff-in-error, The New York Electric Lines Company, is J. Aspinwall Hodge, Esq. The attorneys for the defendant-in-error are Messrs. Blandy, Mooney & Shipman, all of the City of New York. Mr.

Edmund L. Mooney is of counsel for the defendant-in-error. I have received letters from the counsel on both
4 sides to the effect that they have no objection to my submitting and filing such brief. On October 1st, 1914, I wrote to J. Aspinwall Hodge, Esq., attorney and of counsel for the plaintiff-in-error, The New York Electric Lines Company, asking whether he or the gentlemen associated with him in the case as counsel would have any objection to my filing such a brief, and I received a letter from him dated October 3rd, 1914, stating that he would interpose no objection to the filing of any brief I might desire to present to the Supreme Court. On October 6th, 1914, I received from Mr. Edmund L. Mooney, one of the principal counsel for the defendant-in-error, a letter written in reply to one of mine of the 5th inst., in which he said that he had no objection to my filing a brief as
5 *amicus curiae* on behalf of my client Middleton, in the same case.

My relation and that of my client, said Middleton, to the said cause now pending in this Court, is as follows: This case, No. 63, above-entitled, is a writ of error whereby the New York Electric Lines Company brings up for review by the United States Supreme Court a decision of the New York Court of Appeals, affirming a decision and order of the Appellate Division of the New York Supreme Court, which also affirmed a final order of the Special Term, made by a single judge of that Court, which last named final order denied an application for a peremptory writ of mandamus, brought by the plaintiff-in-error, the New York Electric Lines
6 Company against the defendant-in-error, Empire City Subway Company.

The said New York Electric Lines Company claims to be a telegraph company; in 1883 it obtained a permit from the Board of Aldermen of the City of New York to lay electric wires in and through the streets of that City,

etc.; it has in fact never laid any wires and has had many litigations with the civic authorities upon the question of what its rights under said permit are, if any. In 1886 it claimed the right to lay such wires in the subways or conduits to be constructed by itself; that claim was contested because the City was then engaged in establishing an exclusive municipal subway system, under which the defendant-in-error here, the Empire City Subway Company, was finally chartered to build such a system and operate the same, wherein all low tension electric wires of New York City, including telegraph and telephone wires, are placed. The Lines Company was defeated in all these litigations, one of which came to this Court in 1892 (145 U. S., 175). 7

On July 10, 1910, this present mandamus proceeding now before this Court for review as aforesaid was commenced in the New York Supreme Court by the New York Electric Lines Company, plaintiff-in-error, as aforesaid, to compel the Empire City Subway Company to permit the plaintiff-in-error to place its wires in the electrical conduits or subways of the Empire City Subway Company in the Streets of New York. The Subway Company had declined to permit the entry of the Lines Company into its conduits, apparently on the ground that the Lines Company had no right in the Streets of New York; and on its application and on the application of the Lines Company for a mandamus to compel the Subway Company to receive its wires, the New York State Courts decided against the Lines Company, practically on that ground, and the mandamus having been denied and the order of denial having been finally affirmed by the New York Court of Appeals this writ of error was sued out by the Lines Company in September, 1912, and the cause is now awaiting argument in this Court as aforesaid. 8 9

Meantime and pending the said mandamus proceeding, in September, 1910, my client, Clifford L. Middleton,

a citizen and taxpayer of the City of New York, began an action in the Supreme Court of the State of New York,
10 in the County of Kings, against the New York Electric Lines Company, the plaintiff-in-error here, and against the Empire City Subway Company, the defendant-in-error, and against the City of New York and one of its officials for an injunction to prevent the said Lines Company from placing its wires in said subways and to prevent the other defendants from permitting the same to be done. The grounds of that action were that the City of New York was financially interested in said subways and in their operation; that the said Middleton was a taxpayer of the City; that he had a statutory right under the law of New York as such taxpayer to intervene to protect the City's interests; that the franchise to lay such wires and operate the same was of great value; that the
11 claim of the Lines Company to lay such wires in the streets or subways was illegal and without foundation and would result in a loss to the said City in various ways therein stated; that the so-called franchise of the said Lines Company was invalid and had been revoked; and on other grounds. The statute of New York (Laws 1892, Chap. 301), permits such action on behalf of a taxpayer in a proper case. Such proceedings were had in that action that an injunction was obtained by the said Middleton in said New York Supreme Court, forbidding the acts complained of and said injunction is still in full force and effect. My said firm of Atwater & Cruikshank are attorneys and I am of counsel for said Middleton in said action and have had charge of the case from the beginning and am familiar with all the facts and circumstances
12 thereof. From time to time when said cause has been reached for trial upon the trial courts' calendars it has been postponed on the representation of counsel that the mandamus proceeding now here for review as aforesaid was pending, in which some of the most important

of the questions involved in the Middleton case would be considered; and after the New York Court of Appeals had finally decided the mandamus case adversely to the 13
Lines Company it was further represented to the New York Trial Court that a writ of error had been sued out bringing the said mandamus case up before this Court, and that it would be well to postpone the trial of the Middleton case until the decision here in this Court; and for that reason the said Middleton case is still pending untried in New York, awaiting the hearing and disposition of this case. I have carefully examined the record in both the Middleton case and in this case pending here, and I am satisfied and it is perfectly apparent that the grounds upon which the mandamus proceeding was brought and resisted in the New York State Courts were such, that the most important of the questions passed upon by the New York State Court in the mandamus case were iden- 14
tical with the most important questions to be tried out in the Middleton case. For instance, in both cases is the question of the construction or interpretation of the permit or license or so-called municipal franchise, granted by the Board of Aldermen in 1883 to the New York Electric Lines Company, which is the basis of their claim to lay electric wires and to operate a telegraph in the New York Streets; also whether action was ever had by the Lines Company under that permit; whether the same became dormant or expired; whether it was subsequently revoked, as was claimed in both cases, by a resolution of the Board of Estimate and Apportionment of the City of New York in 1906; whether such resolution was valid etc. In fact the decision of the New York courts granting 15
Middleton his injunction, which is still in force, was based upon the decision in the mandamus case made in this very cause now under review here.

And the said Middleton is therefore interested in this controversy, first on account of the pendency of said liti-

gation, in which he desires to succeed both for his own sake and for the interests represented by him therein and
16 wherein he is liable for the costs; and the result of which will apparently be influenced, if not determined, by the result of the hearing in this cause; and also as a taxpayer of the City of New York, because under the statute and the contracts between the City of New York and the Empire City Subway Company, the City has a reversionary interest in the said subways and a present interest in their proper operation; and it appears from the record that any injection of a great number of new telephone and telegraph wires in the said subways as proposed by the plaintiff-in-error will seriously affect said subways and said subway system and involve a great outlay of money.

On behalf of said Middleton I have made a careful study of the record and briefs in this case and of the
17 questions involved and believe not only that his action in New York is meritorious but that my brief to be submitted here will contain some material points and suggestions not elsewhere fully presented, and if received will materially aid this Court in the proper disposition of the present controversy.

ALFRED B. CRUIKSHANK.

Sworn to before me this }
13th day of October, 1914. }

ELLA DROHEN,
(SEAL) Notary Public,
18 New York County.

ENDORSED:

Due and timely service of the within affidavit and notice of motion is hereby admitted this 13th day of October, 1914.

BLANDY, MOONEY & SHIPMAN,
Attorneys for Empire City Co.

Affidavit of Service Annexed to Motion Papers

U. S. SUPREME COURT. 19

N. Y. Electric Lines Company, Plaintiff, *against* Empire City Subway Company, Defendant.	Affidavit of Service on Person in Charge of Office.

State of New York,)
County of New York,) ss.: 20

Frank England being duly sworn, says: That he is of the age of 18 years and upwards; that on the 13th day of October, 1914, between the hours of 1 P. M., and 1:30 P. M., he served the annexed affidavit and notice of motion on J. Aspinwall Hodge, the attorney for the plaintiff in-error, in the above-entitled action, at his office, No. 5 Nassau Street, in the City of New York, Borough of Manhattan, by delivering to and leaving with a person in charge of said office, a true copy thereof; said attorney being absent therefrom at the time of said service.

FRANK ENGLAND.

21

Sworn to before me this 13th)
day of October, 1914.)

Ella Drohen,
Notary Public,
New York Co.

Supreme Court, U. S.
FILED
APR 17 1913
CLERK

Supreme Court of the United States

OCTOBER TERM, 1913

No. [redacted] 68

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Plaintiff-in-Error,

vs.

EMPIRE CITY SUBWAY COMPANY,
(Limited)
Respondent-Defendant-in-Error.

Brief for Respondent-Defendant-in-Error.

EDMUND L. MOONEY,
Attorney for Defendant-in-Error,
27 Wall Street,
New York City.

EDMUND L. MOONEY,
CHARLES T. RUSSELL,
FREDERICK A. CARD,
Of Counsel.

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"	Board of Aldermen of the City of New York, April 10, 1883 (Record, p. 59, fol. 177)	35
"	Board of Estimate and Apportionment of the City of New York, May 11, 1906 (Record, pp. 169-170, fols. 506-509)	8

The various litigations instituted by the plaintiff are as follows:

PEOPLE EX REL. N. Y. ELECTRIC LINES *v.* SQUIRE,

Court of Common Pleas of the City and County of New York, Special Term, Opinion by Allen, J., 1 N. Y. State Reporter, 633.
Same Court, General Term, 14 Daly (N. Y.) 154.
New York Court of Appeals, 107 N. Y. 593.
United States Supreme Court, 145 U. S. 175.

PEOPLE EX REL. N. Y. ELECTRIC LINES *v.* ELLISON,

New York Supreme Court, Special Term, Opinion by Bischoff, J., 51 Misc. (N. Y.) 413.
Same Court, Appellate Division, 115 N. Y. App. Div. 254.
New York Court of Appeals, 188 N. Y. 523.

IN THE MATTER OF N. Y. ELECTRIC LINES *v.* EMPIRE CITY SUBWAY CO.,

New York Supreme Court, Special Term, Opinion by Bischoff, J., 69 Misc. (N. Y.) 200.
Same Court, Appellate Division, 140 N. Y., App. Div. 934.
New York Court of Appeals, 201 N. Y. 321, 202 N. Y. 587.

Supreme Court of the United States,

October Term, 1912.

No. 829.

New York Electric Lines Company,
Relator-Plaintiff-in-Error,

vs.

Empire City Subway Company,
(Limited),
Respondent-Defendant-
in Error.

In Error to the Supreme Court of the State of New York.

BRIEF FOR RESPONDENT-DEFENDANT IN ERROR.

Statement of Facts.

This is a writ of error to review the denial of an application for a peremptory writ of mandamus

to compel defendant-in-error, operating electric conduits in the City of New York, to lease certain space therein to Relator, plaintiff-in-error. The contract, under which the defendant-in-error operates its conduits, confines it to leasing space only to corporations having lawful authority to operate electric conductors in the City of New York. Space was not allotted on the ground, among others, that the plaintiff-in-error is not a corporation so lawfully authorized.

The brief of the plaintiff-in-error states (at page 2) "Application for the writ was denied on the ground that the permission of the City to relator to lay and operate its conductors in the streets was a mere license, which the City might revoke, at its pleasure, and had assumed to revoke, without notice to the relator, or affording it any opportunity to be heard." In fact, the writ was denied, primarily, upon the ground that the Permission contemplated only the operation of a subway conduit business, and that the relator "has never been granted a franchise to occupy the conduits" for telephonic communication (201 N. Y. 331).

The plaintiff in error ignores that phase of the decision of the court below. Still other points are referred to in the opinions of the State Courts of New York.

The plaintiff-in-error was incorporated under the general Telegraph Act, but its real and declared purpose was to *build subway conduits,* and not to do a telegraphic or telephonic buusiness, and that purpose it pursued in its litigations

with the city officials for upwards of twenty years (pp. 124, 135, 136, 161, fols. 370-372, 405, 406, 483). Even now it does not intend to do a telegraph or telephone business, but has farmed out its franchise (Ex. AA, p. 217, fol. 649; Ex. E, p. 285, fols. 853-864).

The New York Electric Lines Company persistently turned its back on the business of telegraphing and telephoning and disclaimed any intention of engaging in such business, and none of its litigations was directed towards carrying on any such business but towards carrying on a distinct business of constructing and maintaining *subway conduits* (p. 161, fol. 483); it did not at the time of the commencement of this proceeding conduct or carry on, nor has it ever conducted or carried on a telegraphic or telephonic business (p. 124, fol. 402).

Why the Electric Lines Company, which was incorporated under the Telegraphic Act, did not attempt to carry on a telegraph or telephone business, or at least a telegraph business, during the quarter-century of its alleged existence does not appear, unless it be that it practically construed the Permission which it had obtained from the City as being limited to a *conduit* business.

It did not file any map or plan under its alleged franchise but only one entitled "Map of New York City" (p. 64, fol. 190), attempting to pre-empt in a wholesale way every street in the city, and did not lay out a system of conduits, except by tracing lines on the map and filing it in the County Clerk's Office (p. 152, fols. 455-456).

No maps were ever filed by the company with the Board of Commissioners of Electrical Sub-

ways, nor was any application to the said board ever made by the company for approval of its plans, for permission to lay conduits, or to open the streets, or for any other purpose whatever (p. 153, fol. 457).

The first year of the relator's incorporation expired on October 14, 1883. Up to that time it had taken some steps towards its corporate organization, obtained its alleged grant from the Board of Aldermen and filed the map above referred to, and that is substantially all. It had not obtained a permit to actually open any street, nor had it opened a foot of street nor laid a foot of wire, nor has it ever done so. There is nothing to show that during that period it had any plans approved, or material or appliances for entering upon the construction of subways or underground electrical conductors. It did not apply to any local authority for a permit to enter upon its work of opening the streets for more than two years after this time, and when applied for it was denied (p. 153, fols. 457-458) and that denial affirmed by this Court (145 U. S. 175).

The answering affidavits deny the allegation contained in the moving affidavits that:

> The company has ever stood ready, upon any public demand therefor, to furnish a comprehensive system of electrical conductors for telephonic purposes and is now actively engaged in meeting present public demands;

and, on the contrary, set forth that:

> The only thing that the New York Electric Lines Company ever attempted to furnish were conduits for electrical conductors, and

not electrical conductors themselves for telephonic purposes. The New York Electric Lines Company was not at the time of the commencement of this proceeding engaged in any business, but had turned all of its business and property over to the Great Eastern Telephone Company (pp. 129, 130, fols. 387-388).

The moving papers set forth a number of places where the relator claims to have had an office and factory. These allegations were denied and numerous affidavits supporting the denials as to the specific places mentioned were submitted, showing that the New York Electric Lines Company has never had an office or factory for the transaction of business since the time of its formation (pp. 307-311, 314-322, 325-326, fols. 921-932, 940-964, 973-78).

From 1883 to 1886 the New York Electric Lines Company did not seek to carry out any plan or work of its own, but from 1884 to 1886 it sought to secure from the Board of Commissioners of Electric Subways a contract to build and operate a general system of subways in accordance with the plans and specification of the Commission (p. 153, fols. 458, 459).

Not until the summer of 1886 was anything further done. On July 20, 1886, the company made application to the Commissioner of Public Works (ignoring the Board of Commissioners of Electrical Subways) for a permit to open the streets, which was denied by the Commissioner on August 23, 1886, (p. 153, fols. 458-459).

The relator company never began its corporate business and never laid a foot of wire nor did anything whatever beyond obtaining its al-

leged franchise or permit, except to carry on experiments with regard to patents and litigation in an attempt to construct a general subway conduit system, deliberately turning its back on the business which it was incorporated to conduct (p. 154, fol. 462).

While it is true that in 1882 the "art" of placing electric wires underground had not advanced to its present high state, there was a practicable method of conducting electricity underground for high and low tension wires, which was availed of by those engaged in the business (p. 155, fol. 463).

It is certain that nothing was ever done or attempted in the way of actual construction or operation (p. 157, fols. 468-469).

The plaintiff-in-error seeks to excuse its business inactivity for over a quarter of a century by saying that the patents on the multiple switchboard prevented it. That is not true in fact (as appears below) but even were it true as affecting a telephone business, it should be borne in mind that the appellant was incorporated under the Telegraph Act and its certificate of incorporation authorized it to carry on a Telegraph business, which was unaffected by the patent situation.

The answering affidavits state in detail the facts showing that the relator was not prevented by the patent situation from engaging in business (pp. 159-160, 195, 197, 208; fols. 477, 478, 479, 584, 585, 590, 592 & 621).

As to the relator's alleged expenditures in its business prior to 1892, it will be observed from the moving papers that the alleged expenditures were, it is claimed, "largely for patents, and for manufacturing," neither of which was in the di-

rect line of its business and none of which resulted in the laying of a foot of wire or the construction of a foot of conduit (pp. 157-158, fols. 471, 472).

It is not true that there has been expended in and about the business of said New York Electric Lines Company from 1900 to date a sum in excess of four hundred thousand dollars. It will be observed from the moving papers that only an unspecified portion of that alleged sum has been expended directly by the company; the rest of it being alleged to have been expended "by its stockholders and those in contractual relation with the company or its stockholders," evidently referring to the Great Eastern Telephone Company and others with whom the relator claims to have contractual relations (p. 158, fols. 472-474).

The sum alleged in the affidavit of Wayne W. Wilson to have been "expended in reliance upon the charter and franchise rights of the company and the decisions of the courts declaring them to be irrevocable" could not have been and was not so expended, for the reasons, among others, that there has been no decision of any court declaring the charter and franchise rights of the company to be irrevocable (p. 159, fols. 474-475).

No part of the moneys alleged in the moving papers to have been disbursed or expended in the business of the New York Electric Lines Company was ever expended in the business for which the said company was created, as specified in its certificate of incorporation. It never has conducted nor attempted to conduct a telegraph or telephone business in the City of New York. Some moneys were expended by Mr. Shelbourne,

the former president of the company, and by those associated with him in an endeavor to install a conduit system in the City of New York, but the public authorities and the courts uniformly held that the New York Electric Lines Company had no right to install such conduit system, and in fact no part of any such system was ever installed in the City of New York, or attempted to be installed otherwise than through proceedings in the Courts, which were all held to be unfounded. (p. 159, fols. 476-7).

The claim of the plaintiff in error that it has been engaged in the transaction of business is completely met by the following quotation from its own Annual Report filed January 18th, 1901, in which it said that its assets consisted of "a certain franchise which the said company has as yet *been unable to use,* and *certain patents in same condition*" (p. 312, fol. 935; see also pp. 332-333, 338-340, fols. 994-999, 1013-1020).

The answering affidavits allege that the relator, the New York Electric Lines Company, is not the real party in interest in this proceeding (p. 130, fol. 389).

The ordinance of the Board of Aldermen of April 10, 1883, being the so-called secondary franchise of the relator, expressly provided that the Permission "is conditioned that the said company shall not transfer or dispose of the franchise hereby granted without the further authority of the Common Council, and that it will make no discrimination of individuals or corporations in the rental and use of its lines or wires which may be laid down hereunder" (p. 130, fols. 388-389).

On the 11th day of May, 1906, the Board of Estimate and Apportionment adopted the following resolution (pp. 169 & 170, fols. 506-509):

WHEREAS, The New York Electric Lines Company, under a resolution of the Board of Aldermen, passed April 10, 1883, claim to have received permission to open the streets of the city and construct subways in which to place wires for telegraphic and telephonic communication and for electric illumination, and by reason thereof claims a perpetual franchise in the streets of the city; and

WHEREAS, The said company has failed and neglected to construct such subways and lay said wires for over twenty-three years, and now seeks leave to open the streets, and construct subways and lay wires therein for the use of the Great Eastern Telephone Company, under its said alleged perpetual franchise therein; and

WHEREAS, If said company has not lost its corporate existence and all its charter rights and privileges, by reason of its failure to satisfy and comply with the terms of the statutory enactments applicable thereto, in the opinion of this Board, it has long since forfeited by reason of non-user all rights and privileges it may have secured under the permission granted by said resolution of the Board of Aldermen on April 10, 1883; it is therefore

Resolved, That any and all rights or privileges to the use of the streets, if any such rights or privileges still exist, acquired by said New York Electric Lines Company under the permission granted said company by the said resolution of the Board of Aldermen passed April 10, 1883, be and hereby are revoked and terminated; and the resolution of the Board of Aldermen adopted on such date is hereby in all respects repealed and revoked.

A true copy of resolution adopted by the Board of Estimate and Apportionment May 11, 1906.

The moving affidavits *affirmatively* alleged that the relator, the New York Electric

Lines Company has not transferred any of its franchises to any other company or individual (p. 30, fol. 90). That allegation was denied by the answering affidavits which also set forth that all of the rights, franchises and property of the New York Electric Lines Company were transferred and disposed of by the relator to the Great Eastern Telephone Company, a corporation organized under the laws of South Dakota, known as a "holding or pioneer company" long prior to the commencement of this proceeding, and that at the time of the commencement of this proceeding, the said Great Eastern Telephone Company of South Dakota was and now is the sole owner of all the franchise rights and property of said New York Electric Lines Company, the relator, subject to a so-called "perpetual lease of telephone rights" which said Great Eastern Telephone Company of South Dakota had, prior to the commencement of this proceeding, executed to the Great Eastern Telephone Company organized under the laws of the State of New York, known as an "operating company" and which latter company is intended to develop "telephone rights" only (p. 130, fols. 389-390).

By the transfers and dispositions aforesaid the appellant New York Electric Lines Company divested itself of all of its rights, property and franchises, and the transferee, the South Dakota company, has attempted to split up or subdivide said franchises so as to transfer only so much of said franchises as relate to the so-called "telephone rights" to the New York corporation of the same name, retaining or attempting to retain so much of said franchises as relate to the tele-

graphic and electric illuminating businesses, which it claims, for itself (p. 131, fol. 391).

If such transactions shall be held to be lawful, the result will be that under one permission or franchise several corporations will be conducting several businesses and systems under the streets of the city (p. 131, fol. 392).

Not only were the foregoing transactions in the teeth of the terms of the alleged franchise of the appellant but were known to be so, for the answering affidavits set forth a communication from the president of the appellant dated away back in January 1886 to the Commissioners of Electrical Subways, in grandiloquent phrase, as follows:

> " 'that from the time of its incorporation in October, 1882, its single aim and pursuit have been to furnish such an underground system, entirely of its own ownership, and to provide every possible safeguard against falling into the hands or control of any one of the existing companies or becoming subject to the power of any combination whatever.
>
> " 'With such objects in view very early in its corporate history to wit, in April, 1883, when its franchise was obtained from the Common Council, it was provided in that franchise that the very existence of the company's business in this city should depend on its integrity and good faith to the public in not bartering away its franchise and in making no discrimination of individuals or companies, in the common use of its lines of wires or in the fair and equal facilities provided for all interests, present and future' " (p. 132, fols. 394, 395 and 396).

It will be observed further that, on the one hand, the so-called "*control* of the New York

Electric Lines'' by the Great Eastern Company, referred to in the circular marked Exhibit CC (p. 217, fols. 651-685), has, during the five years that have elapsed since that circular was issued, ripened into "*ownership*" of the New York Electric Lines Company, the plaintiff in error, by the Great Eastern Company as now set forth in the so-called "Diagram of Financial plan" referred to below (p. 217, fols. 649-650). It also appears, on the other hand, from a comparison of this circular with the moving papers, that the Great Eastern Telephone Company (in the name of the plaintiff in error) subordinates, for the moment, its claim "to build its own conduits," and for the first time asserts a claim to place its wires in the conduits of the Empire City Subway Company (Limited).

During the pendency of these proceedings the following diagram was published and distributed by the plaintiff-in-error:

DIAGRAM OF FINANCIAL PLAN (EXHIBIT AA, PAGE 217, FOL. 649).

Great Eastern of South Dakota as a HOLDING or Pioneer Company has acquired

OWNERSHIP OF

New York Electric Lines Company (New York Corporation) $5,000,000 capital owning a PERPETUAL franchise for old city of New York (fully adjudicated) covering Telephone, *Telegraph and Electric Illumination.*

CONTROL OF

New York & Eastern Telegraph & Telephone Company (New Jersey Corporation) owning Brooklyn PERPETUAL franchise (fully adjudicated). Covering *Telephone, Telegraph, Electric Light, Heat and Power, Pneumatic Tubes, Conduits, Cold Storage, etc.*

PERPETUAL lease of telephone rights to OPERATING Company to be known as

(Operating Company.)

GREAT EASTERN TELEPHONE CO.

(New York Corporation.)

Increase stock capital from $1,000,000 to $50,000,000, and issue $50,000,000. First Mortgage 5% 20-year, Sinking Fund Convertible Gold Bonds, secured by franchise rights and present property consisting of 107,000 contracts with subscribers; Long Distance contract; Suburban contract; Denio Fire-Alarm contracts; Private Service party lines; Patents (66 claims); Engineering Surveys, Maps, Plans, etc.

This company will develop the *telephone* rights only.

> This means that the property of the Great Eastern Telephone Company of South Dakota consists of the ownership of the New York Electric Lines Company and the control of the New York and Eastern Telegraph and Telephone Company, and it has given a perpetual lease of the telephone rights to the operating company known as the Great Eastern Telephone Company of New York (p. 212, fols. 632-634; see also pp. 287-288, fols. 856-859).

The letter of D A. Reynolds, in his capacity of President of the Great Eastern Telephone Company (Exhibit E, pp. 285-288, fols. 853-864), contains an express adoption of the so-called "diagram of financial plan" and an express statement that it "shows the relative positions of the several companies and clearly illustrates how it is possible for us to have SECURED THESE FRANCHISES" (fols. 856, 857). The words used in the so-called "diagram of financial plan" with respect to the relator New York Electric Lines is that the Great Eastern Telephone Company of South Dakota "has acquired OWNERSHIP of the New York Electric Lines Company" (Ex. AA., p. 217, fols. 649-650). The statement in this letter that the Great Eastern Telephone Company has secured these franchises leaves no doubt of the character of, and describes the ownership, as does also the expression in the fourth paragraph of this letter: "Having taken over the franchises and executed the lease for telephone rights" (p. 287, fol. 859).

The brief of Plaintiff-in-error (pages 8 and 54) asserts that state, county and city taxes have been paid by the Company from the time of its incorporation to the present, including a special tax on its franchise. These allegations are denied (pp. 145, 146, fols. 435, 436, pp. 171-172, fols. 513 and 514).

The Plaintiff-in-error claims to have entered into contracts with a large number of telephone users (pages 8 and 53 of their brief), but the facts set forth in the answering affidavits show that they are merely forms of applications to the Great Eastern Telephone Company and none of them to or with the Relator, the New York Electric Lines Company. All of them were obtained many years ago; many of them were signed by persons who are now dead, or have moved away, and many more of them are admittedly not authentic (pp. 149-151, fols. 446-452). (The forms of the so-called applications or contracts are to be found at pages 302 to 306, folios 904 to 918; and are identified at p. 17, fols. 50-51; pp. 213-214, fols. 639-641).

POINT I.

This Appeal should be dismissed as not involving a Federal question.

This is a writ of error to the Supreme Court of the State of New York to review a final order affirmed by the Court of Appeals of said State, denying the application of the relator for a peremptory writ of mandamus (Record, pages 400-415). The only federal question which was or could be involved in the case was whether a resolution of the Board of Estimate and Apportionment of the City of New York of May 11, 1906, was a law impairing the obligation of a contract, and, therefore, repugnant to the Constitution of the United States. Whether the resolution of the Common Council of April 10, 1883, created a contract or was merely a revocable license was involved in the question.

That the repugnancy of the revoking resolution of the Board of Estimate to the Constitution of the United States is the only possible federal question involved is apparent from the fact that its repugnancy to the Constitution or laws of the State of New York would not raise or present a federal question (Yazoo M. V. R. Co. *v.* Adams, 180 U. S. 41; Zadig *v.* Baldwin, 166 U. S. 485).

The plaintiff in error argues only the question whether the resolution of the Common Council of April 10, 1883, created a valid contract which could not be impaired by the State Law or taken without due process of law.

Such a federal question, we contend, was not properly raised and decided so as to present it

for consideration by this court, or, if decided, its decision was not necessary to the disposition of the case.

A. No federal question was raised or decided.

Unless the face of the record shows that a federal question was raised and was necessarily involved, this court will not look into the opinion but will dismiss the appeal (Moore *v.* Mississippi, 88 U. S. 636; State *v.* Board of Liquidation, 98 U. S. 140; Otis *v.* Oregon Steamship Company, 116 U. S. 548).

In the record in the case at bar, as it appeared in the state court, no mention is anywhere made of any federal question or of the alleged repugnancy of the repealing ordinance or resolution of the Board of Estimate to the Constitution of the United States.

In order to be considered by this court the federal question must have been raised in the State Court before its decision of the cause (Hulbert *v.* City of Chicago, 202 U. S. 275).

The record must show either expressly or by necessary intendment that the federal question was raised in the State Court (The Victory, 6 Wallace, 382; N. Y. Central R. R. Co. *v.* New York, 186 U. S. 269; Winona &c. R. Co. Town of Plainview, 143 U. S. 371).

Also that the State Court knew or ought to have known that the validity of the State law was challenged as repugnant to the Constitution or the laws of the United States (Endowment, etc. Assn. *v.* Kansas, 120 U. S. 103; Dewey *v.* Des Moines, 173 U. S. 193). Upon the record, it appears that the alleged repugnancy of the revoking resolution to the Constitution of the United States was first raised in the assignment of errors on the applica-

tion for the writ of error to review the judgment of the Court of Appeals (Record, pages 408-410). That was too late (Johnson *v.* N. Y. etc., 187 U. S. 491; Telluride Power Trans. Co. *v.* Rio Grande W. R. Co., 187 U. S. 569).

From the opinion as a whole, and reasonably considered, all that the Court did or intended to do, apparently, was to determine the scope and validity of the resolution of revocation under the Constitution and Laws of the State of New York and not in reference to the laws or Constitution of the United States. The statement in the moving papers for the mandamus that the resolution of the Board of Aldermen of 1883 was irrevocable did not necessarily refer to this effect under the Constitution of the United States, but that statement, as well as the decision of the Court as to its revocability, might and did properly refer to the State Law and Constitution. (Layton *v.* Missouri, 187 U. S. 356; Seeberger *v.* McCormack, 175 U. S. 274.)

B. If it be considered that a federal question was raised and decided, its decision was not necessary, and, hence this Court has no jurisdiction to review the judgment.

This question is considered and the rule stated in the opinion of Mr. Justice Holmes, in Leathe *v.* Thomas (207 U. S. 93).

If two questions are decided, and the non-federal question is sufficient to support the judgment, this court will not entertain the appeal. (Castillo *v.* McConnico, 68 U. S. 674; Wood, etc. Co. *v.* Skinner, 139 U. S. 293, 295; Enstis *v.* Bolles, 150 U. S. 361.)

(1) From an examination of the opinion of the Court of Appeals, it appears that the writ was de-

nied and the judgment affirmed primarily upon the ground that the right granted to relator by the resolution of the Board of Aldermen of 1883 was a right only to build conduits under the street for the purpose of placing therein electrical conductors; that the legislature by various acts known as the Subway Acts, passed after the grant of the Permission by the Board of Aldermen, had itself practically annulled the resolution of the Common Council for underground subways, and that the relator "has never been granted a franchise to occupy the conduits" for telephonic communication. (201 N. Y. 330, 331.)

This, we submit, was a non-federal question depending upon the construction of the ordinance of the Board of Aldermen of 1883 in connection with the charter of relator and the laws of the State of New York relating to telephone and telegraph companies. A question purely of state law as to which this court will not review the decision of the state court. (Yazoo M. V. R. Co. *v.* Adams, 180 U. S. 41; Zadig *v.* Baldwin, 166 U. S. 485.)

Under such construction of the resolution of the Board of Aldermen of 1883, and its charter and the laws of the State of New York, it had no right to carry on a telephone business through the subway ducts and the denial of the writ of mandamus was proper, without regard to the question of the revocability of the ordinance of the Common Council of 1883. This was the decision of a non-federal question which was and is sufficient to support the judgment denying the writ of mandamus and therefore this court has no jurisdiction to review the judgment. (De Saussure *v.* Gaillard, 127 U. S. 216.)

(2) Another non-federal question that was presented in the State Court was that of non-user and abandonment.

That issue was preferred by the moving affidavits (p. 112, fols. 335 & 336), and put in issue by the answering affidavits (pp. 126, 129, 134-136, fols. 378, 385-387, 402-406), including the recitals in the resolutions of 1906 (pp. 127-128, fols. 379-382), and that no application for space in the subway was made until June 17th, 1907, which had been abandoned. (p. 136, fol. 407; see also Ex. K., p. 77, fol. 231.)

(3.) A third non-federal question that was presented in the State court was that the relator failed to establish that there was an existing demand for the construction of such conduits or subways as were asked for by it, or that the occupation of such conduits or subways was reasonably assured, or that the public interests required the construction thereof:

Chapter 263 of the Laws of 1892 provides as follows:

> "No such permit shall be granted by said board unless, if the application be for underground construction, there is an existing demand for the construction of such conduits or subways, nor unless the occupation of such conduits or subways is reasonably assured, and the public interests require the construction thereof".

The board referred to in the statute quoted was the Board of Electrical Control. The Commissioner of Water Supply, Gas & Electricity is the successor of such board. The act is still in force. The issue was expressly raised at page 157, fols. 470 and 471 of the answering affidavits.

POINT II.

This proceeding is solely to enable the relator to promote a telephone business, which was beyond the scope of the Permission granted by the City.

If the scope of the Permission granted by the City is not co-extensive with the certificate of incorporation of the plaintiff-in-error, under the General Telegraph Act, but is limited to the construction and operation of subway conduits, and the leasing to other corporations of conductors installed therein, the plaintiff-in-error has no right to promote a telephone business, which is the sole object of this proceeding.

When the plaintiff-in-error was before this Court on a prior occasion, it was seeking the right to carry on a subway conduit business (145 U. S. 175), not a telephone or telegraph business. The question as to whether it had a franchise was left open (p. 189 *id.*), as well as the scope or extent of the Permission granted by the City. In the present record, facts are presented showing the surrounding circumstances under which the Permission was granted, the limitation by the Electric Lines Company, itself, to a subway conduit business and its frequent disclaimers of any right to do a telephone or telegraph business.

That the plaintiff-in-error was incorporated to conduct a subway conduit business and not a telephone business is shown on the face of the moving papers, quoted below (pp. 19 & 20).

In arriving at a decision of this question we may consider the following: (a) the certificate of incorporation and the statements made in the

moving papers as to the purposes of the incorporation; (b) the Permission and the surrounding circumstances under which it was granted, and the attempt to pre-empt all the streets in the City for conduit purposes; and (c) the declarations and disclaimers of the Electric Lines Company and its officers relating to the alleged franchise, many of which were made in previous litigations. We will consider these matters in the order stated:

(a) *The certificate of incorporation and the statements made in the moving papers as to the purposes of the corporation.*

The Electric Lines Company, while incorporated under the General Telegraph Act, limited itself (by its certificate of incorporation) to lines *to be placed under the pavements and under the sidewalks* (p. 48, fol. 142).

Jesse Larrabee, who was counsel for the Electric Lines Company during the first year of its organization and thereafter (p. 100, fol. 298) states as follows:

> "Mr. Shelbourne's (the promoter of the Electric Lines Company) attention was called to the confusion existing in this city among the electric light, telephone, telegraph and similar Companies in this city about the year 1881, and realized that there would be a great growth in such business, involving the extension of electrical conductors throughout the city. To meet the requirements of the existing and expected situation, said Shelbourne conceived the idea of a corporation to supply the underground electrical conductors for use by various electric companies in the City of New York", etc. (fols. 299-300).

It is reasonably clear from the statement of Mr. Larrabee, and the peculiar limitation to *underground* work in the certificate of incorporation, that the corporation was incorporated under the General Telegraph Act merely because that Act most nearly approximated the object which the promoters had in view, namely: the building of subway conduits and the leasing of lines therein.

In addition to the quotation from Mr. Larrabee's affidavit (at folio 300), the moving papers further set forth that

> "It (the plaintiff-in-error) has aggressively fought its opponents from 1885 down to this date, and by various proceedings in the courts endeavored to secure for itself the right to lay conduits in the streets under its franchise" (p. 17, fol. 49).
>
> "* * * never during my connection with the Company did it ever abandon its intention of constructing conduits under its franchise in the streets of New York City." (p. 88, fol. 264).
>
> "The Company made prompt application in the Spring of 1883 to the authorities of the City for a franchise, and in prosecuting the said application met much opposition, the same was finally granted, was accepted by the Company and the Company thereupon immediately laid out a comprehensive system for conduits in the city and filed the necessary map in the County Clerk's office in the Spring of 1883." (p. 98, fols. 293 and 294).

The above quotations are taken from the moving papers and are, we assume, to be read in *pari materia* with the certificate of incorporation and the Permission granted by the Common Council.

(b) *The Permission and the surrounding circumstances under which it was granted and the attempt to pre-empt all the streets in the City for conduit purposes.*

The most important question on this branch of the case is the *scope* of the Permission, which was afterwards granted to the company by the Common Council, and not the specific purposes of incorporation. That Permission, we submit, was merely to conduct a subway conduit business and not to promote a telegraph or telephone business.

In

Coosaw Mining Co. *v.* State of South Carolina, 144 U. S. at p. 562,

it was said:

> "The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. Statutory grants, of that character, are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. This principle, it has been said, 'is a wise one, as it serves to defeat any purpose concealed by the skilful use of terms to accomplish something not apparent on the face of the Act, and thus sanctions only open dealings with legislative bodies.'"

The State Court of Appeals held on this subject as follows:

> "In view of the fact that the relator has never attempted to engage in the business of electric lighting or of supplying transmitters and receivers for telephonic communication or of instruments for telegraphing *and has never been granted a franchise to occupy the conduits therefor*, the contention that it may now do so under the old resolution of the Common Council of 1883, we think would be giving to it powers not embraced in or contemplated by the resolution and should not now be adopted or sanctioned." (Italics ours.) (Record, p. 118; 201 N. Y. pp. 321, 330.)

The facts shown in the record abundantly sustain the conclusion of the Court below that the plaintiff in error has never been granted a franchise to occupy the conduits for a telephone business.

The most direct way of interpreting the scope of the Permission is to refer to the map (so-called) and the tabular statement thereto annexed, as indicating what the parties intended at the time. The company filed a map which is entitled "Map of New York City" (Exhibit G), on the 18th of May, 1883 (p. 16, fol. 48), "Showing the streets, avenues and highways in

the city proposed to be occupied by the New York Electric Lines Company, and in which the said Company has designated and located the spaces for its lines of electric conductors, *being spaces of two feet wide and variable depths*, with also spaces at the street corners for connection boxes on each side of *every* street, avenue and highway, shown on this map, and approximately indicated thereon by red lines; said spaces of two feet wide are designated as follows" (p. 64, fols. 190, 191). The tabular statement or specification filed therewith recites that

> "the map herewith indicates the streets of the City in which the said company designated its spaces to be reserved for the use of its lines of wires and other electric conductors, being *all* the *streets*, avennes and highways of the City, the said streets, avennes and highways, *whether* as yet *open* to the public or not, and being a *space* of *two* feet *wide* by *two* feet in *depth* as provided in the said general ordinance" (p. 65, fol. 195).

In addition to the foregoing specific acts, which we assume will be regarded as internal evidence of the intention of the parties in the grant of the Permission, and to be read as part of it, numerous acts and declarations of the company itself and of its officers are set forth in the answering affidavits showing that it intended to operate only as a conduit company and

> "never intended to serve the public at large as common carriers in sending and receiving telegraphic messages" (p. 136, fol. 406).

(c) *The declarations and disclaimers of the Electric Lines Company and its officers, many of which were made in previous litigations.*

In the answering affidavit of John H. Cahill, Vice-President of the defendant in error Empire City Subway Company (Limited), he said:

> "I knew Sidney F. Shelbourne, who was President of the New York Electric Lines Company, well during his lifetime. I often met him in attendance before public boards and bodies and elsewhere, and discussed with him what he expected to do, himself, and what he expected his company to do. His purpose as expressed to me and before the public bodies was to obtain for his company the right to construct a general underground subway conduit system in the City of New York, the contract for which was subsequently awarded to the Consolidated Telegraph and Electrical Subway Company, and in turn the low tension subways to the Empire City Subway Company (Limited). Said Shelbourne often spoke of improvements which he was making and expecting to make with respect to installation and kindred matters in connection with electrical subways, but he never spoke of a telegraphic or telephonic business except to disclaim his intention and the intention of his company to enter into the telegraphic and telephonic business, and to devote his and its entire energies to the construction or leasing of subway conduits" (p. 124, fols. 370-372).
>
> "The New York Electric Lines Company, the relator, is not a company or corporation having lawful power to operate telegraph or telephone conductors in any street, avenue or highway in the City of New York" (p. 133, fol. 398).

"The New York Electric Lines Company did not at the time of the commencement of this proceeding conduct or carry on and has never conducted or carried on a telegraphic or telephonic business (p. 134, fol. 402).

"The New York Electric Lines Company has repeatedly, by its acts and declarations, disclaimed any intention to operate electrical conductors for telephonic or other purposes, and has thereby abandoned any right which it may have had under its articles of incorporation, or the resolution of the Board of Aldermen of April 10, 1883, to itself operate electrical conductors for any purpose whatever. Among such acts and declarations are the following:

"(1) In the verified petition of said company to the Court of Common Pleas for a writ of mandamus against Rollin M. Squire, as Commissioner of Public Works, dated August 25th, 1886, it was stated that 'your petitioner has never operated or intended to operate electrical conductors, its intention having always been and still being, to lease to other persons, natural or corporate, all of its electrical conductors, and not to operate itself any of such conductors, or any other electrical conductors.'

"(2) In the complaint of said company in an action brought by it against John D. Crimmins, the Board of Electrical Subway Commissioners and others in the Supreme Court of the City of New York, in 1886, which complaint was verified September 27th, 1886, it was again stated that 'this plaintiff has never operated nor intended to operate electrical conductors, its intention having always been and still being to lease to other persons, natural or corporate, all of its electrical conductors, and not to operate itself any of such conductors, or any other electrical conductors.'

"(3) In the affidavit of Sidney F. Shelbourne, president of said company, sworn to October 9th, 1886, and filed in opposition to an application made to the Attorney-General on or about said date on the petition of Daniel L. Gibbens, it appears that the intention and purpose of said Company was to furnish 'a general system for all other companies in New York City, not only of conduits, but also a perfected and harmonious system of electrical conductors, ready for use, with the greatest convenience to the companies in said city using electricity. That said company is a private corporation not clothed with a public interest, or amenable to the people at large by reason of any corporate functions in which the people of the State have any concern, duty or relation. That said company has never intended to serve the public at large as common carriers in sending and receiving telegraphic messages.'" (pp. 134-136, fols. 402-406).

Summary.

The main proposition upon which the case was decided in the Court below was that the New York Electric Lines Company has never been granted a franchise to occupy the conduits for the business of telephoning or telegraphing. That proposition was stated first in order in the opinion of the Court of Appeals (201 N. Y. 330-331) and, if sound, dispenses with any necessity for a determination of the question of revocation. This basic proposition is not argued in the brief of the plaintiff-in-error. If the plaintiff-in-error received a Permission to construct and operate subways only, it is no Permission to promote a general telephone business, which is the sole object of this proceeding, and, therefore, the revocation or at-

tempted revocation of the subway conduit Permission did it no harm.

As was said by Mr. Justice Swayne in

Insurance Company *v.* Dutcher, 95 U. S., 269, 273:

> "The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former."

See also Woolsey *v.* Funke, 121 N. Y., 87.

This determination was vigorously reiterated in the case of Seymour *v.* Warren, 179 N. Y., 1, 6.

> "There is no better way of ascertaining the meaning and construction of a written contract than to look at the acts and conduct of the parties under it."

The Court is not confined, in interpreting the contract, to the proceedings of the Board of Aldermen, but may look to the acts of the parties under the alleged Permission in ascertaining its meaning.

City of New York *v.* New York Refrigerating Co., 146 N. Y., 210, 216.

In the case of

Nicoll *v.* Sands, 131 N. Y., 19,

the Court, writing by Peckham, J., said at p. 22:

> "It seems to me to be too clear for argument that the contract between the town au-

> thorities and the waterworks company obliges the latter to furnish water, in addition to erecting works, which would be comparatively valueless unless they were put to the use which their erection would imply. The obligation is just as binding upon the company, if it can be fairly implied from the language actually used in the contract, as if it were in so many words specifically mentioned therein."

And further at page 23:

> "Taking everything in the contract and the writings explanatory of its purpose, and its practical execution and construction by the parties, and we have no hesitation in saying there was a binding contract to deliver pure and wholesome water to the town authorities and to the inhabitants up to a maximum amount (if required) to two million gallons every twenty-four hours.
>
> "The practical construction put upon a contract by the parties to it, is sometimes almost conclusive as to its meaning."

Looking at the acts and conduct of the parties under the Permission, it is plain, beyond doubt, that during a period of twenty-four years the plaintiff-in-error asserted that the object and scope of the Permission was to build a comprehensive system of subways for the use of all comers, and that that was its single aim. When the Legislature, in the exercise of its police powers, determined that such comprehensive system should be built under the jurisdiction of the Subway Commissioners and not by the plaintiff-in-error, it did not transform a subway conduit or wire leasing permission into a general telephone franchise.

The foregoing views, if correct, will relieve the Court from considering the constitutional question that is urged on its consideration by the plaintiff-in-error.

POINT III.

The Permission granted to the relator by the resolution of the Common Council of April 10, 1883, was not accepted and acted upon in fact, and is no longer in force.

This point is raised by the answering affidavits (fols. 374, 377).

The question as to whether the relator's alleged franchise constituted an irrevocable contract first became the subject of judicial consideration in the case of People *ex rel. v.* Squire, 14 Daly, 154-160, where Judge Allen, in an opinion at Special Term that was affirmed by the General Term of the Court of Common Pleas, on the opinion below, said (p. 160):

> "Any privilege granted authorizing encroachments upon the public streets, until it has been accepted and acted upon, is a mere revocable license and may be recalled at pleasure; but after it has been accepted and acted upon, it becomes a contract within the meaning of the clause of the constitution which secures the inviolability of contracts by declaring that no state shall pass any law impairing their obligation."

On appeal,

People *ex rel. v.* Squire, 145 U. S. 175,

the Supreme Court of the United States, Mr. Justice Lamar writing the opinion of the Court, said (pages 188, 189):

> "In order to determine whether the relator's essential rights have been invaded, or the contract which it claims to have entered into impaired, or its property taken away without due process of law, it will be necessary to ascertain what rights and property it possesses under the alleged contract of April 16, 1883. This contract, *if such it be*, must be gathered from the statutes of the State, under which the relator was organized, and the ordinances of the city, (which it accepted) by which its privilege of constructing an underground electrical system was conferred. * * *
>
> "Conceding, then, for present purposes, *without deciding that such was the case*, that the relator had a contract with the City of New York for the laying of its wires," &c. (italics ours).

Many years afterward when the Board of Estimate and Apportionment had adopted the resolutions purporting to revoke the Permission or alleged franchise, the plaintiff-in-error again sought the right to build subways of its own. Its application was denied by all the Courts of the State upon the ground that the Subway Acts were a proper exercise of the police power of the State and by their effect deprived the appellant of the right to build subways in the City of New York, the question of any other right of the relator

company under said ordinance being expressly reserved and not decided.

> Peo. *ex rel.* N. Y. Electric Lines *v.* Ellison, 51 N. Y. Misc. 413; 115 N. Y. App. Div. 254; 188 N. Y. 523.

And an appeal, which had been taken to this Court was abandoned (pp. 25, 26, 166, fols. 75 & 76, 496).

> Peo. *ex rel.* N. Y. Electric Lines *v.* Ellison, 214 U. S. 529.

(A.) Alleged acceptance.

We do not question the general principle laid down in the cases cited by the plaintiff-in-error that an ordinance that has been accepted, *i. e.*, that has been acted upon in good faith, constitutes a contract and may not be revoked.

The real point is: What constitutes an acceptance within the meaning of that term as used in the decisions of this Court? A mere verbal acceptance, under which nothing is begun or done for upwards of twenty years, or an acceptance in fact carried into effect?

We do not attempt to ascribe to the resolution (which revoked or attempted to revoke the original permission) such efficacy as to destroy a charter or contract, if any such there had been, but to revoke a consent or license that had not ripened into a franchise by an acceptance in reality and by action thereunder.

Where the statute provides that a corporation may use the streets of a city upon the consent of the municipal authorities, a consent so granted does not become a contract until the corporation has begun to do the thing required.

> Capital City Light and Fuel Co. *v.* City of Tallahassee, 186 U. S., 401, affirming 42 Fla. 462; 28 Southern Reporter 810.

Mr. Justice Peckham, delivering the opinion of the Court in the case last cited, quoted and approved the opinion of the Court below, as follows, at page 410:

> "'In the next place, even if an exclusive privilege of this nature, tending to establish a monopoly, was granted without such express condition precedent as we find in our (Florida) statute, such grant does not become a contract or a vested right so as to be protected by the Constitution of the state or the United States, until the company has, to say the least, begun to do the thing required by the charter as the consideration for the grant of such privilege.'"

Such a Permission would only become irrevocable provided it were acted upon by the person or corporation to whom it was given.

Pearsall *v.* Great Northern Railway, 161 U. S., 646.

City Ry. Co. *v.* Citizens St. Ry. Co., 166 U. S., 557.

Postal Tel. Cable Co. *v.* City of Baltimore, 156 U. S., 210.

Galveston City Railway Co. *v.* Galveston City Street Railway, 63 Texas, 529.

Chicago City Railway Co. *v.* Story, 73 Ill., 541.

City of St. Louis *v.* Western Union Tel. Co., 148 U. S., 92, 103.

Harshman *v.* Bates County, 92 U. S., 569.

3 Kent's Comm. *458.

In *City of St. Louis* v. *Western Union Telegraph Co.*, 148 U. S., 92, 103, in deciding against the company upon the ground that it had not acted upon an ordinance, the court said, among other things, at page 103, in answer to the contention of the company that a valid contract was created: "* * * the difficulty of the application of that doctrine in this case is that there is nothing to show that a single pole was erected under or by virtue of ordinance number 11,604."

In the case of *Pearsall* v. *Great Northern Railway Company*, 161 U. S., 646, the court said at p. 673:

> "* * * the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked if a possible exercise of such power is found to conflict with the interests of the public."

The application and the limitation of the rule is thus stated in *City Railway Co.* v. *Citizens Street Railway Co.*, 166 U. S., 557, 567: "The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition, when accepted by the company and the road built and operated as specified, became a contract which the State was not at liberty to impair during its continuance; but if at the expiratio of the thirty years, the road had been sold to another company, and that company had applied for and obtained from the Common Council a franchise to occupy its streets for another period,

it seems to be clear that such a contract would need no other consideration to support it than the continued operation of the road under such conditions as the City chose to impose."

In the case of *New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., 650*, the court reviews numerous cases showing that it is the action that is taken upon the ordinance or permission, evidencing real acceptance, that makes it a contract and not a mere acceptance in words. The opinion quotes from one case (*Bridge Proprietors v. The Hoboken Co., 1 Wall, 116, 146*) as follows (pp. 662 & 663): "On the faith of this enactment they invested the money necessary to erect the bridges. These acts and promises, on the one side and the other are wanting in no element necessary to constitute a contract"; and also quotes from *In re The Binghamton Bridge, 3 Wall, 51*, as follows: "The Legislature, therefore, says to public spirited citizens: "If you will embark, with your time, money and skill in an enterprise which will accommodate the public necessities, we will grant to you for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill. Such a grant is a contract, with mutual considerations; and justice and good policy alike require that the protection of the law should be assured to it."

The learned counsel for the appellant cited in the Court below some cases, among them Trustees of Southampton *v.* Jessup, 162 N. Y., 122, and City of Rochester *v.* Rochester Ry., 182 N. Y., 99, to support the argument that as soon as the ordinance was accepted in words it became a contract. But a careful reading of those cases will

show that when the word "acceptance" was used, it meant the actual acceptance by the doing of the thing contemplated.

In citing and following the case of Pearsall *v.* Great Northern Ry. (*supra*), the Court of Appeals of New York, said in the case of

> People *v.* Adirondack R. Co., 160 N. Y., 225, 247;
>
> "There is no property in a naked railroad route, existing on paper only, that the State is obliged to pay for when it needs the land covered by that route for a great public use, and its officers are authorized to act by appropriate legislation."

In the case at bar it is admitted by the moving papers, and cannot be denied, that the appellant never entered upon the work authorized by the permission of the common council of April 10, 1883 and never even attempted to do so. The filing of the so-called Map, which was entitled "Map of New Yok City" (p. 64, fol. 190), which was made by tracing lines on the map and filing it in the County Clerk's office (p. 152, fol. 456), attempting to pre-empt in a wholesale way every street, avenue and highway, opened and unopened (pp. 64-65, fols. 190 & 191, 195), was a sham act.

It is further to be noted that the original resolution or permission of the Board of Aldermen of April 10, 1883, contained this express provision:

> "Resolved, that the permission of the said New York Electric Lines Company hereby intended by the Common Council is *conditioned* that the said company shall not transfer or dispose of the franchise hereby granted without the further authority of the Common Council, and that it will make no discrimina-

> tion of individuals or corporations in the rental and use of its lines or wires which may be laid down hereunder" (p. 59, fol. 177).

The first portion of this provision clearly indicates that it was the intention of the common council to grant such permission or right to the New York Electric Lines only upon condition that it should not transfer nor dispose of the franchise or right thereby granted without the further authority of the common council. This condition had been broken by the New York Electric Lines Company by its attempted transfer of its rights to the Great Eastern Telephone Company, so that this breach of condition terminated and destroyed any rights which the New York Electric Lines Company obtained under such resolution of the common council, and furnished a proper and sufficient basis for the revocation. The attempt to "construct subways and lay wires therein for the use of the *Great Eastern Telephone Company*, under its said alleged perpetual franchise therein" was expressly recited in the latter resolution (p. 169; fol. 507).

> Los Angeles Company *v.* Los Angeles, 152 Cal., 242; 15 L. R. A. N. S., 1269, 1272; affirmed 177 U. S., 558.

The learned counsel for the plaintiff-in-error rely mainly on the case of City of Louisville *v.* Cumberland Telephone and Telegraph Company (224 U. S. 649). The facts showing an actual acceptance and performance of the work, were very strong in that case:

> "The ordinance was accepted, the $50,000 bond was given, and the Ohio Valley Telephone Company erected poles, strung wires

and maintained a telephone exchange in the City of Louisville until January 27, 1900 when it consolidated with the Cumberland Telephone and Telegraph Company * * *. Upon this consolidation on January 27, 1900 the Cumberland Telephone and Telegraph Company entered into possession of all the property of the Ohio Valley Telephone Company, and operated the plant, poles and wires in Louisville until April 7, 1902, when the City Council passed an ordinance that the Cumberland Company should execute a bond for $50,000 as required of the Ohio Valley Telephone Company under the ordinance of August 17, 1886. This was done and on June 2, 1902, the Council passed a resolution that 'the bond of the Cumberland Telephone and Telegraph Company, successor of the Ohio Valley Telephone Company, principal, and the American Bonding Company of Baltimore City, as surety, be and the same is hereby accepted and approved, and the Ohio Valley Telephone Company, and its sureties, are hereby relieved from all liability under their bond of August 28, 1886'. The Cumberland Company fully complied with the agreement as to carrying the police and fire wires of the city free of charge, greatly enlarged the telephone system in the City, and, at an expense of more than a million dollars, improved the plant and trebled the number of subscribers, although there was in the city another telephone company with a large number of patrons" (pages 651-652).

After reciting the proceedings taken by the Common Council attempting to revoke the ordinance, the statement of facts proceeds as follows:

"The Cumberland Company thereupon filed its bill in the United States Circuit

> Court for the Western District of Kentucky, setting out the facts above outlined alleging that it was the successor to the Ohio Valley Telephone Company, which in reliance upon the ordinance of August 17, 1886, had erected a telephone system; that the Cumberland Company, as its successor under the terms of the Consolidation Act and in accordance with the contract between the City and the Ohio Valley Telephone Company, carried on the telephone business, and does now carry upon its poles and underground conduits the fire alarm and police wires of the city free of charge, which wires have been and now are daily used by the city in the conduct of its police and fire departments; that the Cumberland Company has largely extended and improved the plant, appliances and business, and in doing so has expended $1,700,000 'all of which was done upon the faith of and in reliance upon the said ordinance'. It alleged that the repealing of the ordinance of 1909 impaired the obligation of its contract and deprived the company of its business and property without due process of law, and that, unless enjoined, the City would remove the poles and wires and destroy the company's business to its irreparable damage" (p. 653).

The actual acceptance of the original ordinance by the performance of the company's obligations thereunder was so fully demonstrated by the facts above mentioned that there could not be and was not any question in the case as to what constituted an actual acceptance of a franchise. It was from that standpoint that Mr. Justice Lamar said:

> "Those charter franchises had become fully *operative* when the City's consent was

> given, *and thereafter the company occupied the streets and conducted its business*, not under a license from the City of Louisville but by virtue of a grant from the State of Kentucky" (p. 659) (Italics ours).

As touching the reciprocal considerations involved in such a contract relation, Mr. Justice Lamar, referring to a contention that the original ordinance had been repealed by a new Constitution of the State of Kentucky, said:

> "For, while this charter-conferred privileges, it also created obligations in favor of the public, and no attempt was made by the general law to repeal the rights which had vested nor to relieve the company of the burden which had been imposed". (p. 660.)

In the case at bar no burden that was imposed was accepted in good faith.

As touching the reciprocal obligations of the parties under such ordinance or alleged franchises, the Court said, in Louisville case, pages 663 and 664:

> "In considering the duration of such a franchise it is necessary to consider that a telephone system cannot be operated without the use of poles, conduits, wires and fixtures. These structures are permanent in their nature and require a large investment for their erection and construction. To say that the right to maintain these appliances was only a license, which could be revoked at will, would operate to nullify the charter itself, and thus defeat the state's purpose to secure a telephone system for public use. For, manifestly, no one would have been willing to incur the heavy expense in installing these necessary and costly fixtures if they

> were removable at the will of the city and the utility and value of the entire plant be thereby destroyed. Such a construction of the charter cannot be supported, either from a practical or technical standpoint".

In the case at bar, there was no erection or construction nor any attempt to open the streets until after the adoption of the Subway Acts (p. 19, fols. 55 and 56) which virtually superseded the Permission.

The learned counsel for the plaintiff-in-error insist that the only distinguishing feature between the case at bar and the case of City of Louisville *v.* Cumberland Telephone and Telegraph Company (224 U. S. 649), is "the bare fact that the Cumberland Company was permitted, after the grant, to string and operate its wires, while the Lines Company was not permitted to do so" (p. 25 of their brief).

The fact is that the plaintiff-in-error never sought permission to string or operate wires, during a period of upwards of twenty years, but, on the contray, disclaimed any intention so to do, making only sporadic applications to the Courts for leave to construct subways after, and only after, the adoption of the Subway Acts (pp. 124, 129, 134-136, fols. 372, 385-387, 402-406, People *v.* Squire, 14 Daly 154; 145 U. S. 175; Peo. *ex rel.* N. Y. Electric Lines *v.* Ellison, 51 Misc., 413; 115 App. Div. 254; 188 N. Y. 523).

In Owensboro *v.* Cumberland Telephone and Telegraph Company (230 U. S. 58) which is cited by the plaintiff-in-error, it appeared by stipulation in the record pp. 116, 117, that the telephone company had erected its plant in the City of Owensboro and operated a telephone business

continuously since the time of its organization. Mr. Justice Lurton said, at page 66:

> "*If the grant be accepted and the contemplated expenditure made,* the right cannot be destroyed by legislative enactment, or city ordinance based upon legislative power without violating the prohibitions placed in the Constitution for the protection of property rights (italics ours).
>
> To quote from a most weighty writer upon municipal corporations, in approving of the decision in People *v.* O'Brien, 111 N. Y., 1, 42 —a decision accepted and approved by this Court in Detroit *v.* Detroit Citizens Street R. Company, 184 U. S. 368, 395— 'The grant to the Railway Company may or may not have been improvident on the part of the municipality, but having been made, and the *rights of innocent investors and of third parties as creditors and otherwise having intervened,* it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly when the construction adopted by the Court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the court correctly held, *under the legislation and facts,* that the right created by the grant of the franchise was perpetual and not for a limited term only. Dillon Mun. Corp., 5th Ed., 1265.)
>
> * * * * * * * *
>
> "When that grant was accepted *and acted upon by the grantee* it became a contract between the City and the telephone company, which could not be revoked or repealed, unless the power to repeal was clearly and unmistakably reserved" (p. 72).
>
> * * * * * * * *
>
> "The contention here advanced, if conceded, would paralyze the contractual power of

> the City, for if it has application to this ordinance, it would equally apply to every other contractual ordinance which the City might enact, though the contract had been accepted and *expenditures made*" (p. 74) (italics ours).

Mr. Justice Day, in a dissenting opinion, in which Mr. Justice McKenna, Mr. Justice Hughes and Mr. Justice Pitney concurred, said:

> "Moreover, if limited grants are to be construed into perpetuities then the control over streets for railway, telephone, and other kindred enterprises of enormous value are granted to private corporations without compensation for the use of such valuable rights which belong to the municipality. Recent cases in this Court have shown the great value of such privileges, and that investors are found who are willing to pay for the privilege of using the public streets for these purposes" (p. 81).

This language is directly in line with that of the Court below in the case at bar (201 N. Y. at p. 334) where Judge Haight said:

> "During the preceding generation, franchises in the streets of our cities were considered of but little or no value and were readily given away to those promising public service benefits. Now they have become of immense value and the public have become deeply interested in having and enjoying the benefits derived therefrom. We have, therefore, called attention to the more recent decisions of our courts for the purpose of showing their tendency with reference to the granting away of the rights of the public, especially so far as our streets and highways are concerned. And why are they not right!

> Should a public service corporation be permitted to acquire an irrevocable franchise by mere acceptance without spending a dollar by way of performance, and then hold up the public in its enjoyment of the privileges contemplated by the grant indefinitely, or until they can be bartered away for a fortune? Should the municipalities to whom the Legislature has delegated the right to grant permits for the use of their streets for public service purposes be denied the power to revoke licenses granted, in case of failure of the grantee to render substantial performance? We think not. No reasons for the deprival of the municipalities of such power are suggested and none are apparent to our minds."

The learned counsel for the plaintiff in error quote a portion of the opinion of Mr. Justice Lurton in Board of Mayor, etc., *v.* East Tenn. Telephone Co., 115 Fed. Rep., 304 (p. 34 of their brief), which concludes as follows:

> "If there is any principle of jurisprudence that is beyond dispute and discussion in this nation, it is this: An accepted act of incorporation of a private corporation is a contract between the State and the corporation (Pearsall *vs.* Great Northern Ry. Co., 73 Fed. 933, 936) and cannot be impaired unless the right to do so is reserved."

The case of Pearsall *v.* Great Northern Ry. Co., upon which Mr. Justice Lurton relied is one of the cases, as reported in this Court (161 U. S. 646) upon which the opinion of the State Court of Appeals in the case at bar was based (201 N. Y. 333).

Mr. Justice Lurton used and elaborated in Owensboro *v.* Cumberland Telephone and Telegraph Co., 230 U. S. 58 (at p. 66), the phrase

which he had used in the East Tennessee case, *supra*:

> "If the grant be accepted *and the contemplated expenditure made*, the right cannot be destroyed by legislative enactment, or city ordinance passed upon legislative power, without violating the prohibitions placed in the constitution for the protection of property rights." (italics ours.)

Again in Boise Artesian Hot & Cold Water Company *v.* Boise City, 230 U. S. 84, the same learned justice said (p. 90):

> "The grant of the right to lay water pipes upon the streets for the purpose of distributing water, found in the ordinance of October 3, 1889, purports to be nothing more than the grant of the right to occupy the streets of the City with the distributing pipes of the water company. *It was accepted, and about $200,000 has been expended in the construction of the necessary works and the laying of its system of pipes under the streets* (italics ours). The assertion of the right to require the company, after so many years of occupation, to pay a monthly rental for the use of the streets, is grounded upon the claim that under the grant to the Eastmans it had obtained nothing more than a revocable license, and its occupation of the streets was therefore subject to be terminated at any time.
>
> "The right which is acquired under an ordinance granting the right to a water company to lay and maintain its pipes in the streets is a substantial property right. It has all of the attributes of property. It is assignable, and will pass under a mortgage sale of the property and franchises of the company which owned it."

That the general principle laid down by this Court respecting the contract attributes of an accepted franchise is to be read in the light of the "facts" indicating or underlying the alleged acceptance, is shown in Dillon, Municipal Corpns., 5th ed. § 1265, quoted by Mr. Justice Lurton in Owensboro *v.* Cumberland *supra* (p. 66) with great encomium, where the author, approving of the decision in People *v.* O'Brien, 111 N. Y., 1, said:

> "In the absence of language expressly limiting the estate or right of the company, we think that the Court correctly held, under the legislation *and facts* that the right created by the grant of the franchise was perpetual and not for a limited time only." (Italics ours.)

So, conversely, in the case at bar the Court below said:

> "We, consequently, conclude, *under the circumstances of this case*, (italics ours) that the board of estimate and apportionment had the power to and did revoke the permit granted to the relator under date of April 10th, 1883" (201 N. Y. 334).

The learned counsel for the plaintiff in error have quoted at length (page 33 of their brief) from the opinion of Clark, District Judge, in the case of Africa against Board of Mayor etc. of Knoxville, 70 Federal Reporter 729, apparently oblivious of the fact that the decision in that case was reversed in Mayor etc. of Knoxville *v.* Africa, 77 Federal Reporter 501, in an opinion written by Mr. Justice Lurton, then Circuit Judge, in which Taft, Circuit Judge, and Hammond, District Judge, concurred.

The learned counsel for the plaintiff in error have quoted at length (page 36 of their brief) from Suburban R. T. Co. against Mayor etc. of New York, 128 New York 510, without observing that, in that case, the plaintiff was organized under a Special Act, known as the Rapid Transit Act. The Court in that case, said: "With the ordinary railroad company, formed under the General Railroad Act, the enterprise, as to construction and operation, is inchoate after it is erected into a corporation; whereas the corporation which is erected under the Rapid Transit Act, commences its existence and operations with everything planned and, except in details, perfected. Its line of road as located in the streets, places or lands over which it is confined by the Commissioners, are impressed with a public use, and are dedicated to the purposes and uses of the corporation to be organized."

The language quoted from that case by the learned counsel for the plaintiff-in-error in their brief must be read in the light of the special franchise under consideration in that case.

The learned counsel for the plaintiff in error quote at length (page 36 of their brief) from a dissenting opinion of Chief Judge Cullen in People *ex rel.* New York Edison Company *against* Wilcox, 207 New York 86, which in turn was expressly based on the Suburban Rapid Transit Company case last above cited. The opening sentence of the quotation, as it appears in their brief, page 37, is: "A franchise, though unexercised, is property within the constitutional safeguards". Upon referring to the volume of the New York Reports, 207 New York, at page 111, that identical statement will be found to be sup-

ported only by the citation of Suburban Rapid Transit Company *against* The Mayor, etc., *supra*, which, as we have seen, dealt with a special charter. We have not found any case which goes to the extent of holding that a franchise, though unexercised, is property.

The learned counsel for the plaintiff in error say of the decision of the State Court of Appeals at p. 27 of their brief:

"It is impracticable and contrary to precedents, too long and uniformly established, to be now destroyed. It limits the power of the state, in such case, to the granting of anything but a license and which the City may revoke or render nugatory and useless at will. If any more enduring or substantial right is sought or to be had, it must be acquired, not from the state or city, but developed out of this license, before its repeal, if possible, by performance of a substantial part of the work contemplated by the license. Not in the part performance of a contract, for there is none, but under a license subject to repeal at any moment."

The language quoted *supra* is a strained construction of what the Court below did hold, viz. that the acceptance must be real, not illusory; that there must not be a total failure of that consideration, which, as is pointed out in all of the cases, is necessary to a franchise contract, as to any contract.

(B) The permission or secondary franchise was lost by non-user and abandonment.

This point was raised by the answering affidavits (p. 126, fols. 377, 378).

In the case of *Louisville Trust Company* vs. *City of Cincinnati*, *76 Federal Reporter*, *296*

(Opinion by Mr. Justice Lurton, then Circuit Judge; concurred in by Taft, Circuit Judge and Hammond, District Judge), the Court—after explicitly recognizing that the grant of a right to enter upon and occupy a public street is entitled to all the protection afforded other property or contract rights (p. 299)—said (at page 315):

> "But only a fragment of this grant has ever been actually used,—that part of the line at the base of the inclined plane south upon Main to Liberty. The rest of the line authorized by this ordinance has never been constructed. The concurrent ownership of the grant under this ordinance and the grant under 'Route 8,' by the same persons, accounts for this disuse of the remainder of the line permitted by this ordinance. * * *
>
> That part of the grant beginning at Liberty and Main, thence west on Liberty to Walnut, thence south on Walnut to Court, seems never to have been occupied by this company under any franchise. The deliberate selection of 'Route 8' as a more desirable means of reaching Fifth street, and the disuse for a period of over 20 years of substantially all of the grant under this ordinance of December, 1871, must, in the absence of countervailing circumstances, be regarded as an abandonment of this grant except in so far as it has been actually used between the base of the inclined plane and Liberty street. Abandonment by non-user of grants of this character may be the more readily presumed, the grant being of a public easement, and for the purpose of providing for and promoting the public good. (Henderson *v.* Railway Co., 21 Fed. 358). There are no circumstances in this case tending to show that this company intended at any time to avail itself of the privileges of this grant. There are no circumstances tending to make the intention of this company

by this long disuse doubtful, nor any facts which tend to prove any extension of the time within which it might have appropriated and used the right of way herein granted, such as appears in the case of Citizens' St. Ry. Co. *v.* City of Memphis, 53 Fed. 715. We think, however, that the occupancy and continued use of the fragment of this grant was an effective acceptance of that part of the grant from the foot of the incline at Mulberry street to the connection at Liberty Street with 'Route 8'."

See also

Delaware, Lackawanna & Western R. R. Co. *vs.* City of Oswego, 92 N. Y. Appellate Division, 551, 555.

In the case at bar, the plaintiff-in-error has never directly nor indirectly attempted to use that feature of its alleged Permission or franchise (if any) which related to the telegraph or telephone business. It has spent all its corporate life, thus far, attempting to carry on a subway conduit business, which more than twenty years ago this Court announced that it had no right to do.

POINT IV.

Assuming that a formal acceptance would have been sufficient, the acceptance in writing of the permission was not a complete formal acceptance, in the absence of the filing of a bona fide map, specifying the amount and position of the spaces proposed to be occupied.

The main reliances of the plaintiff in error are (1) the written acceptance of the permission, and (2) the filing of its so called map, which in reality are but two parts of one act.

The written acceptance, filed with the Common Council, was dated on the 16th day of April, 1883, (p. 60, fol. 186; Exhibit E). The so called map and tabular statement (Exhibit G, pages 64-70), were dated the 15th day of May, 1883 (p. 70, fol. 209), and are alleged to have been filed on the 18th day of May, 1883 (p. 16, fol. 48). It is further alleged that this map was prepared at an expense of $300. (p. 89, fol. 265).

The answering affidavits (which are to be taken as true under the practice of the courts of the State of New York (People *ex rel. v.* Keating, 168 N. Y. 390; see also Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 86), set forth at pp. 152 and 153; fols. 456 & 457: "It did nothing more than to make and file that map attempting to pre-empt in a wholesale way every street in the City, and did not lay out a comprehensive or other system of conduits, except by tracing lines on the map and filing it in the County Clerk's office. No maps were ever filed by the company with the Board of Com-

missioners of Electrical Subways, nor was any application to the said board ever made by the company for approval of its plans, for permission to lay conduits, or to open the streets, or for any purpose whatever".

Reference to the map itself (Exhibit G; p. 64), shows that it is entitled "Map of New York City", and that in connection therewith, and as part thereof, the tabular statement attempts to appropriate to the uses of the company "all the streets, avenues and highways of the City, the said streets, avenues and highways, *whether as yet opened to the public or not,* it being a space of two feet wide by two feet in depth, as provided in the said general ordinance" (p. 65, fol. 195).

There are numerous other provisions in Exhibit G providing, not only in a wholesale way for the use of all the streets, but further for "locations in the same for lines of wires *on both sides*" (p. 69, fol. 207).

Even when the Legislature of the State of New York had, by its general subway acts, provided for the construction and operations of subways and conduits under the authority of a Board of Electrical Control, provision was made only for a limited territory, particularly specified, (p. 34; fol. 101), "and also such further subways, conduits, and ducts for telegraph and telephone conductors * * * as the board from time to time may order" (Exhibit A, p. 34; fols. 101, 103, 107).

The plaintiff-in-error expressly and explicitly recognized that its acceptance of the Permission would not be complete—even in form, until it had done two separate and distinct things: (1) had accepted the express terms of the ordinance of April 10, 1883, and (2) had accepted and com-

plied with the terms of the ordinance of December 14, 1878 (Exhibit F, p. 62, fols. 185-189), by filing, in the latter instance, such a map and specifications as were provided for in the latter. In other words, that the provisions of the two ordinances were inter-dependent and that an acceptance of the Permission was predicated upon a compliance with the terms of the ordinance of 1878, which required the filing of bona fide map and plans within *six months*. Our contention is that the filing of the "Map of the City of New York" with lines traced thereon was a sham (p. 152, fol. 456).

The Permission, itself, provided "that permission be and hereby is granted to the New York Electric Lines Company, to lay wires on other conductors of electricity in and through the streets, avenues and highways of New York City * * * in accordance with the provisions of an 'Ordinance to Regulate the Laying of Subterranean Telegraph Wires and Electric Conductors in the Streets of the City' passed by the Common Council and approved by the Mayor December 14, 1878," etc. (p. 58, fols. 172, 173).

The ordinance of 1878 provided for the laying of subterranean telegraph lines or electric conductors and the method and means of laying the same and further that "Grantees under this ordinance shall be required within *six months* after such permission shall be granted to file with the County Clerk, maps, diagrams and tabular statements indicating the *amount* and *position* of the *spaces proposed to be occupied by them*, and their rights and privileges upon this ordinance *shall be confined to* the spaces, positions and localities as indicated by said maps, diagrams and statements" (p. 63, fols. 188, 189).

The "communication" from the New York Electric Lines Company, dated April 16, 1883 (p. 60, fol. 182) contained the following: "Whereas the said ordinance embraces in its resolutions, certain requirements, provisions, restrictions, conditions, limitations and extensions *not provided in the general ordinance of the Common Council, approved December 14, 1878, under which the franchise granted by the ordinance aforesaid*, hereto annexed, *it is to be enjoyed and exercised by the said New York Electric Lines Company.*

"Now, therefore, the said New York Electric Lines Company by these presents accept the said franchise as contained in the ordinance and resolutions adopted by the Honorable the Board of Aldermen, April 10, 1883, and agrees to, assumes and obligates itself in the observance of all the requirements, provisions, restrictions, conditions and limitations contained in the said last mentioned ordinance as adopted April 10, 1883, *as well also* as to the provisions, conditions and obligations of the said general ordinance approved by the Mayor December 14th, 1878."

More than a month later, as we have seen, on the 18th day of May, 1883, when the New York Electric Lines Company filed a map of New York City (which it calls its map), together with certain specifications (pp. 64-65), it recited among other things: "that the New York Electric Lines Company, a corporation under the Laws of the State of New York, to whom was granted on the 10th day of April, 1883, by the Hon. the Board of Aldermen of the City of New York, notwithstanding the objection of his Hon. the Mayor thereto, a franchise to lay wires and other electric conductors under the streets of the city, in con-

formance (except in certain particulars) with the provisions of the Common Council of the City of New York, passed by the Board of Aldermen, December 10, 1878, and approved by the Mayor, December 14, 1878, hereby and herewith files in the office of the County Clerk, its maps, diagrams, tabular statements, and general specifications, as required by the said ordinance," etc. (p. 65, fols. 193-195).

It is clear from the foregoing that the plaintiff-in-error, itself, recognized the necessity of two things to constitute even a formal acceptance of the Permission: (1) a communication, accepting as far as it was possible to accept in words, the terms of the Permission; and (2) the filing of a bona fide map and tabular statement, plans and diagrams, in accordance with the ordinance of 1878. Furthermore, in this proceeding, the plaintiff-in-error recognized the necessity of making proof that it had filed such a map (pp. 12, 64, fols. 35, 190-192), but when we look at the map and tabular statement we find that it was a sham, in nowise conforming to the ordinance of 1878 requiring the filing of "maps, diagrams and tabular statements indicating the *amount* and *position* of the spaces proposed to be occupied by them" (p. 63, fols. 186 & 189), but, on the contrary, with evident cupidity, it sought to claim under the general language of the ordinance "through the streets, avenues and highways of New York City" (p. 58, fol. 172), "all the streets, avenues and highways of the City, the said streets, avenues and highways *whether as yet opened to the public or not*" (p. 65, fol. 195) and not only did they attempt to pre-empt all of the streets and unopened streets, but attempted to secure "lines of wires on both

sides" (p. 69, fol. 207); and thus they over-reached themselves.

POINT V.

The decision of the federal question—if such be properly raised—does not control the whole case. Other points warrant affirmance.

It is the practice in the courts of the State of New York that a party applying for a writ of peremptory mandamus admits the truth of the allegations in the opposing papers, and they are to be taken as true for the purpose of determining the questions involved (People *ex rel. v.* Keating, 168 N. Y. 390. See also Water-Pierce Oil Co. *vs.* State of Texas, 212 U. S. 86).

The opposing papers in the State Court raise the following questions:

(1) "The Act, Chapter 263 of 1892, contains a provision that no permit to open the streets for underground construction shall be granted unless 'there is an existing demand for the construction of such conduits or subways; nor unless the occupation of said conduits or subways is reasonably assured, and the public interests require the construction thereof.'"

"There was not at the time of the demand of the relator hereinbefore referred to, nor at the time of the commencement of this proceeding, nor is there now, existing demand for the construction of such conduits or subways as have been applied for by the relator, nor was nor is the occupation

of said conduits or subways reasonably assured, nor do the public interests require the construction thereof" (Record, pp. 139, 140, fols. 417, 418).

This question might have been tried out by an alternative Writ of Mandamus.

(2) The relator is not the real party in interest and is not, therefore, entitled to a peremptory mandamus. This point is raised by the answering affidavits (p. 130, fols. 389, 392), People *v.* Rome, Watertown, &c., R. R. Co., 103 N. Y., 95; People *ex rel* Lehmaier *vs.* Interurban St. Ry. Co., 85 N. Y. Appellate Division, 497; People *ex rel* McMackin *v.* Board of Police, 46 Hun (N. Y.), 296.

(3) The application was not made in good faith. Therefore the appellant is not entitled to a peremptory writ of mandamus. The point is raised by the answering affidavits (pp. 132-134; fols. 396-400). (People *ex rel.* Althause *v.* Giroux, &c. Co., 122 N. Y. Appellate Division, 617, 620; People *ex rel.* Hunter *v.* National Park Bank, 122 N. Y. Appellate Division, 635, 639, 641; Matter of Taylor, 117 N. Y. Appellate Division, 248; People *ex rel.* Sherwood *v.* Board of Canvassers, 129 N. Y., 360, 366; People *ex rel.* Durant Land Improvement Co. *v.* Jeroloman, 139 N. Y., 14.)

(4) The relator lost whatever right it had, if any, by laches and the Statute of Limitations, and was not entitled to a peremptory mandamus. The objections were raised by the answering affidavits (pp. 27, 112, 136, 144-145; fols. 80, 81, 335, 406-408, 432-433). (People *ex rel.* Nelson *v.* Marsh, 82 N. Y. Appellate Division. 571; affirmed 178 N. Y., 618; People *ex rel.* Phelps *v.* Delaware Common Pleas, 2 Wend.,

257; People *v.* Collis, 6 N. Y. Appellate Division 467, 469; People *ex rel.* Connolly *v.* Board of Education, 114 N. Y. Appellate Division, 1; affirmed 187 N. Y., 535; People *ex rel.* Millard *v.* Chapin, 104 N. Y., 96, 102.)

The right to maintain mandamus is now governed by the Statute of Limitations, as in an action, and if the statute would be a bar to an action it is, also, to the maintenance of a special proceeding for a writ of mandamus. (People *v.* French, 31 Hun (N. Y.) 617, 618, 619; People *ex rel.* Nelson *v.* Marsh, *supra*).

CONCLUSION:

The writ of error should be dismissed or the final order of the State Court affirmed.

EDMUND L. MOONEY,
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37 Wall Street,
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EDMUND L. MOONEY,
CHARLES T. RUSSELL,
FREDERICK A. CARD,
of Counsel.

Office Supreme Court, U. S.
FILED.
APR 28 1913
JAMES H. McKENNEY,
CLERK.

Service of the following notice and motion papers is admitted, this April, 19 1913.

EDMUND L. MOONEY,
Attorney for Defendant-in-Error,
41 Wall Street,
City of New York.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. [redacted] 83

THE NEW YORK ELECTRIC LINES COMPANY,
Plaintiff in Error,
vs.
EMPIRE CITY SUBWAY COMPANY,
Defendant in Error.

To Mr. Edmund L. Mooney, Attorney for Defendant-in-Error.

PLEASE TAKE NOTICE that on the 28th day of April, 1913, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the annexed are copies, will be submitted to the Supreme Court of the United States, at the Capitol, in the City of Washington, D. C., for a rule or order advancing this cause and setting it

down for hearing and argument on a day to be fixed by the Court.

Dated, New York, April 16, 1913.

Yours &c.,

J. ASPINWALL HODGE,
Attorney for Plaintiff-in-Error,
No. 5 Nassau Street,
Borough of Manhattan,
City of New York.

ALTON B. PARKER,
of Counsel.
111 Broadway,
New York City.

Motion to Advance.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 829.

THE NEW YORK ELECTRIC LINES COMPANY,
Plaintiff-in-Error,

vs.

EMPIRE CITY SUBWAY COMPANY,

Now comes the plaintiff in error by Alton B. Parker, its counsel in this behalf, and moves the Court to advance this cause upon the calendar and to set the same down for argument at the earliest day convenient for the Court.

The matter involved, briefly stated, is whether permission granted by the City of New York to the plaintiff in error to lay wires or other conductors of electricity for telegraphic and telephonic purposes in and through the streets, avenues and highways of the city and to make the necessary connections therewith is a mere revocable license, or an irrevocable contract and property right.

The Court of Appeals of the State of New York, being the highest court of the state, has held, affirming an order of the Appellate Division, that said permission was a license only, which the city might revoke and had revoked. This writ of error was obtained for the purpose of reviewing that order.

The grounds on which this motion is made are

FIRST.—That the one single and controlling question to be determined, and the facts out of which that question arises are, in all respects, so nearly like those in the very recent case of City of Louisville, Kentucky, vs. Cumberland Telephone and Telegraph Company (224 U. S., 649), as to make this a case (within the spirit, almost the letter, of subdivision 4 of Rule 26), "*once adjudicated by this court upon the merits, and again brought up by writ of error.*"

The Court there held that the City franchise could not be revoked or abrogated. There is no controlling distinction whatever between that case and this one. Yet the State courts (prior, however, to that decision), held this franchise revocable, and an alleged revocation thereof by the city valid.

SECOND.— The general public, not only in the City of New York, but thoughout the entire Eastern portion of the Country, is interested in the result of this case, as shown by the following facts:

(a) There are two great systems of telephones in the country, commonly known as the Bell System, and the Independent System, and in almost every city of any size East of the Mississippi both systems have exchanges and large operating plants. These are connected with trunk lines and each, roughly speaking, serves one-half of the inhabitants of the entire territory, and each exchange is connected with the other exchanges of its own system. The City of Boston and the City of New York are now practically the only two Cities of any size which are deprived of this double service, and unless the appellant is permitted to exercise its franchise and to establish exchanges and telephone service within the City of New York, there is no prospect of the

installation of any system within that City, which will connect with upwards of two million telephones of the said Independent System, now outside of the city, and which will install telephones with the users of telephones within the city to be so connected. Contracts have been made with the Independent Companies by the appellants which will relieve these present abnormal conditions, as soon as the appellant is able to exercise its franchise.

(b) Relying upon the franchise of the plaintiff in error contracts have already been made with 107,000 subscribers in the City of New York to supply them with telephones and telephonic connections both local and long distance, and this, too, at rates approximately one-half of the rates charged by the company now operating in that territory, a reduction to these subscribers of about $19,000,000 a year.

(c) If the plaintiff in error has a valid franchise, as it claims, and is permitted to exercise its rights thereunder, long distance connections and communications could be made, within a short time, as it fully appears, with some 250,000 telephones in the State of New York alone, and with, say, 500,000 telephones in other states nearby, to say nothing of the incalculable number of telephone and telegraph connections that would certainly be made with this company's system throughout the country and none of which are now able to make connections with the City of New York, as more fully appears in the record herein, respectfully referred to as part of this application. These connections will open avenues of trade amounting to millions annually with the City of

New York which are now closed. See folios 325 and 327 of record.

(d) Counsel for plaintiff in error will not occupy to exceed thirty minutes in the oral argument of this case.

THIRD.— The third ground for this motion is that in the ordinary course, this case cannot be reached on the docket for one or more years, and meantime all that has been arranged for and prepared by the plaintiff for actual operation, will be lost.

The plaintiff in error has, after many years of litigation, reached this Court upon a simple issue the determination of which will settle, not only the rights of the plaintiff in error, but the chances of the public to obtain efficient telephonic and telegraphic service and at reasonable rates.

Wherefore, the undersigned asks this Court for a rule or order advancing this cause, pursuant to the rules and practice of the Court in such case, and setting it down for argument at the earliest day convenient for the Court.

Respectfully submitted.

J. ASPINWALL HODGE,
Attorney for Plaintiff-in-Error
No. 5 Nassau Street,
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City of New York

ALTON B. PARKER,
of Counsel,
111 Broadway,
New York City.

Office Supreme Court, U. S.
FILED.
APR 28 1913
JAMES H. McKENNEY,
CLERK.

Opposition to Motion to Advance.

Supreme Court of the United States,

OCTOBER TERM 1912

No. [redacted] 63

THE NEW YORK ELECTRIC LINES COMPANY,
Plaintiff in Error,

vs.

EMPIRE CITY SUBWAY COMPANY (LIMITED).

Now comes the respondent by Edmund L. Mooney, its counsel in this behalf, and opposes the motion made by the plaintiff in error to advance this cause upon the calendar.

The grounds stated for such relief do not show the "special and peculiar circumstances" which by Paragraph 7 of Rule 26 of this Court are required "to be shown to the Court."

IN THE FIRST GROUND stated the plaintiff in error concedes that the case does not come within the express terms of Paragraph 4 of that Rule. Nor is the case like the recent case of City of Louisville, Kentucky, *vs.* Cumberland Telephone and Telegraph Company (224 U. S. 649), as the

4 plaintiff in error claims. The distinction has been clearly pointed out in the opinion of the Court of Appeals of the State of New York in the record at pages 418 *et seq.*, 201 N. Y. 321, 332. There the State Court brings the case at bar within the purview of the case in this Court, of Capital City Light & Fuel Co. *v.* Tallahasse (186 U. S. 401) in which it was held (at page 411) that:

> "Such grant does not become a contract or vested right so as to be protected by the constitution of the State or the United States, until the company has, to say the least, begun to do the thing required by the charter as a
5 consideration for the grant of such privilege."

On this point the State Court also says (at pages 417-418 of the record, 201 N. Y. 321, 330-331):

> "It is not pretended that the relator ever had a wire strung or operated over the streets of the city, nor that it had ever entered into any business of telegraphing, telephoning or electric lighting. * * * While it expended a considerable sum of money in procuring patents and making experiments, it is not claimed a single stone was removed from the pavements of the streets or a foot of conduit
6 constructed under the permission granted for the insertion of electrical wires or conductors. The question thus arises as to whether a bare acceptance of the permit granted by the resolution of the common council amounted to an irrevocable franchise granted by the city. Clearly, in the absence of partial performance under the permit, by which some vested interest in property is acquired, the state does not become bound by such permit, for that has been established by the decisions that have already been rendered in this and the

Supreme Court of the United States with reference to this relator's right in the matter." 7

The condition of the record make these facts conclusive on this Court as well as on the Court of Appeals.

People *ex rel.* Pumpyansky *v.* Keating, 168 N. Y. 390, head note 3; 398-399;
Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 86, head note 2; 97;
U. S. R. S. 1011;
Record, pages 126, 153, 156-7, 159, 166-8, folios 378, 457-9, 468-9, 475-6, 498-502. 8

There is therefore the most pronounced distinction between the case at bar and the case referred to by the plaintiff in error.

As to the second ground advanced by the plaintiff in error that the general public is interested in the result, the record controverts the facts assumed. The opposing affidavits, which are conclusive on this Court, as to matters of fact say:

"The so-called contracts which the New York Electric Lines Company claims to have entered into with telephone users are not, in fact, contracts, but merely forms of application, and none of them purports to be made with or directed to the New York Electric Lines Company, the relator, but are directed to the Great Eastern Telephone Company. The contracts which are referred to in the affidavit of Wayne W. Wilson, as having been shown to him and which are alleged to be signed by residents of the City who desire to have telephonic communication with one another and with the world outside of the city by means of wires to be provided by the New York Electric Lines Company are in fact 9

10 nothing more than applications addressed to the Great Eastern Telephone Company, and to which the New York Electric Lines Company, the relator, is not a party. None of the said applications, or so-called contracts, obligates the New York Electric Lines Company, or even the Great Eastern Telephone Company, to do anything.

"At the time of the last application by the relator to the Commissioner of Water supply, Gas and Electricity for a permit to lay conduits, it was stated that over 30,000 subscribers had agreed in writing to use and pay for telephone service, and in a brief filed by the New York Electric Lines Company be-
11 fore the corporation counsel in support of such application the relator stated that the number had since increased to 97,000 within three months. 67,000 additional contracts made within three months would require the making of about nine hundred contracts for every business day. That would seem to be incredible, especially in view of the fact that the New York Electric Lines Company had no facilities whatsoever for the transaction of a telephone business.

"These alleged contracts have not been submitted to any municipal authority or to any court. Such applications or alleged contracts as there are, have been made, not with
12 the New York Electric Lines Company, but with the Great Eastern Telephone Company."

(Record, pages 150-2, fols. 450-4).

As appears by the affidavit submitted herewith the questions involved in the appeal in the case at bar have become moot questions, practically, for the plaintiff in error has since re-tried the same questions in a suit in Equity with the avowed purpose of presenting all the questions later

in that suit for review in this court. (*vide* complaint in that suit submitted herewith as an Exhibit, Pars. IV, pages 7 & 8 and XLIII, pages 29, 30). 13

The public interests therefore do not call for the advancement of this cause.

WHEREFORE the respondent prays a denial of the application for the advancement of this cause.

Respectfully submitted,

EDMUND L. MOONEY,
Attorney and counsel for Respondent,
No. 37 Wall Street, Manhattan, 14
New York City.

15

Office Supreme Court, U. S.
FILED.
APR 28 1913
JAMES H. McKENNEY,
CLERK.

Affidavit in Opposition to Motion.

Supreme Court of the United States,

OCTOBER TERM 1912.

No. 829. 63

THE NEW YORK ELECTRIC LINES COMPANY,
Plaintiff in Error,

vs.

EMPIRE CITY SUBWAY COMPANY (LIMITED).

STATE OF NEW YORK, *County of New York*, } ss.:

EDMUND L. MOONEY, counsel for the respondent herein, being duly sworn, deposes and says:

The final judgment or decree to be reviewed upon the writ of error sued out herein was made as long ago as the 30th day of March, 1911 (Record, page 401). The writ of error to review said judgment was not sued out until as recently as October 16, 1912 (Record, page 412).

4 Between the termination of the proceedings in the State Court and the suing out of the writ of error in this Court the relator through another attorney commenced and prosecuted to judgment a separate suit in Equity in the Supreme Court of the State of New York, which resulted in a judgment in favor of the respondent and against the plaintiff in error on the 22nd day of May, 1912, in and by which all of the issues involved in the case at bar were again litigated at the instance of the plaintiff in error upon the alleged ground that the case at bar was not conclusive of the rights of the parties,
5 and the plaintiff in error desired by that ~~writ~~ suit in equity to have all of the issues finally reviewed by this Court therein. In other words, the position of the plaintiff in error is that the Equity suit has superseded the case at bar so that there need be no hurry in disposing of the case at bar as the plaintiff in error intends to seek a review of the same questions in the Equity suit anyway.

Submitted herewith and marked Exhibit A is a copy of the judgment roll in said action.

SUBSCRIBED AND SWORN to before me this 26 day of April, 1913.

6 EDMUND L. MOONEY.

HENRY HUDSON,
Notary Public,
New York County.

Office Supreme Court, U. S.
FILED
MAY 6 1914
JAMES D. MAHER
CLERK

Stipulation and Supplemental Record.

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 63

THE NEW YORK ELECTRIC LINES COMPANY,

Plaintiff-in-Error,

vs.

EMPIRE CITY SUBWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Supreme Court of the United States

THE NEW YORK ELECTRIC LINES COMPANY, Plaintiff-in-Error, against EMPIRE CITY SUBWAY COMPANY, Defendant-in-Error.	October Term, 1913. No. 370.

IT IS HEREBY STIPULATED by the counsel for the respective parties in the above entitled case:

A. That annexed hereto, marked "Exhibit A," is an order to show cause granted by the Chief Judge of the Court of Appeals of the State of New York, dated the 18th day of April, 1914, returnable before the Court of Appeals on the 22nd day of April, 1914, together with the affidavits in support of said order to show cause, and the affidavits submitted in opposition to the motion upon said order to show cause.

B. That annexed hereto marked "Exhibit B" is a copy of an order made by the Court of Appeals on the 28th day of April, 1914.

C. That after the entry of the last mentioned order, the Clerk of the Supreme Court of the State of New York returned the remittitur to the said Court of Appeals, and thereupon there was annexed to the said remittitur the papers marked "Exhibit C."

D. That this stipulation, together with the papers hereto annexed may be filed as part of the record before this Court, and may be handed to the Court on or before the argument herein, with the same effect and no other as if a writ of certiorari had been issued out of this Court to the Supreme Court of New York, directing a return to this Court of the above mentioned papers, and as if the above mentioned papers had been so returned; but it is stipulated that none of the aforesaid stipulations or any part of them shall be deemed or construed to be any waiver of the right of the respondent to object, which it now does, and may repeat upon the argument herein, to wit:

That the Court of Appeals of the State of New York had no power or authority to direct the return of the said remittitur or to amend the same, or return the same to the Supreme Court of the State of New York; that this Court upon the return should not, under the practice in such cases prevailing, consider the said papers or any of them, as properly part of the record herein.

IT IS FURTHER STIPULATED, UNDERSTOOD AND AGREED, that the respondent herein shall be in the same position before this Court in respect to all objections that it would occupy, if, upon the taking of each of the foregoing steps and

proceedings, all rights had been fully reserved to the respondent to make objection before this Court at this time, and to repeat the same on the argument herein, to each of the aforesaid steps and proceedings, and with the same effect as if said objection or objections had been taken at the time the said steps, motions, proceedings and returns were made.

IT IS ALSO UNDERSTOOD AND AGREED that the relator will forthwith cause this stipulation, together with the exhibits hereto annexed, to be printed and presented to this Court on or before the argument herein, and that the respondent will not object to a motion or request by the relator to the Court to accept the same as part of the record, subject, however, to each and all of the aforesaid objections, and also subject to all objections as to the effect of the said papers upon the rights of the parties hereto.

IT IS FURTHER STIPULATED that the relator hereby consents, and will consent upon the argument that counsel for the respondent may file or hand to the Court with its permission any additional brief that he may desire dealing with the question raised by this stipulation, and that the relator will deliver a copy of any brief which it may desire to present (with the Court's permission) on or before the argument upon the said question, to the respondent's counsel, on Monday the 4th instant, and the respondent on its part will cause to be delivered to the relator's counsel, on Tuesday the 5th instant, a copy of any brief upon

said question which it proposes to present to the Court on or before the argument.

Dated, May 1, 1914.

J. ASPINWALL HODGE,
Atty. for Relator-Plaintiff-in-Error.

EDMUND L. MOONEY,
Atty. for Respondent-Defendant-in-Error.

Exhibit A.

COURT OF APPEALS
OF THE STATE OF NEW YORK.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY, Limited.

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Appellant,

THE EMPIRE CITY SUBWAY, COMPANY, Limited,
Respondent.

On the annexed affidavit of Alton B. Parker, verified on the 17th day of April, 1914, the affidavit

of J. Aspinwall Hodge, verified on the 18th day of April, 1914, and the affidavit of Wayne W. Wilson, verified on the said 18th day of April, and

On motion of J. Aspinwall Hodge, attorney for relator-appellant,

LET the respondent show cause before this Court at a term thereof to be held at its court rooms at the Capitol in the City of Albany, on the 22nd day of April, 1914, at the opening of court on that day or as soon thereafter as counsel can be heard, why this court or its chief judge should not make a certificate in the above entitled action certifying that federal questions were raised by the relator-appellant before this court, to wit: that the franchise possessed by the relator was irrevocable by the state or any of its agents and that the resolution of the Board of Estimate and Apportionment of the City of New York passed on the 11th day of May, 1906, and purporting to revoke the said franchise, was unconstitutional and invalid in that it violated the provision contained in Article I, Section 10 of the Constitution of the United States, providing against the impairment of the obligation of contracts, and in that it violated the provision contained in Section I of the XIV Amendment of the Constitution of the United States providing that no State shall deprive any person of life, liberty or property without due process of law,—and that said federal questions were decided by this court against the appellant and in favor of the revocability of said franchise and of the validity of said resolution or ordinance revoking the same; why the remittitur in the above entitled action should not be amended by adding thereto said certificate; why a duplicate original of said certificate

or a certified copy thereof under the seal of this court should not be delivered to the relator's attorney for presentation to the Supreme Court of the United States should be so advised; and why the appellant should not have such other, further, like or different relief, to the end that it may further and more clearly appear herein that said federal questions were duly raised and decided by this court against the contentions made by the relator that its franchise was irrevocable, because protected by the aforesaid constitutional guarantees and in favor of the contention of the respondent that the said revoking resolution of May 11th, 1906, was valid. Sufficient cause being shown therefor the service of this order to show cause on the respondent's attorneys on or before the 20th day of April, 1914, shall be deemed sufficient.

Dated, April 18th, 1914.

WILLARD BARTLETT,
Chief Judge of the Court of Appeals
of the State of New York

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a writ of Mandamus,

vs.

THE EMPIRE CITY SUBWAY COMPANY, Ltd.,
Respondent.

State of New York,
County of New York, } ss.:

Wayne W. Wilson, being duly sworn, says that he is the secretary of the relator, and has been since the year 1905, and has been a director since the beginning of 1900, and a stockholder since about the year 1894.

The company has ever relied, and especially since this deponent has become the secretary thereof, upon the federal and state constitutional guaranties, and has always been advised that its franchise with the city was a contract, which was protected by Article 1, Sec. 10, of the United States Constitution. The constitutionality of the Subway Acts under that article and under the XIV amendment was litigated by the relator in the *Squire* case, referred to in my moving affidavit herein, but all that was decided in that case was that the contract or franchise of the relator was not impaired by those Acts; and in the *Ellison* case it

was claimed by the relator, further relying upon the federal constitution, that the state could not deprive the relator of the right *to construct subways*. But this court determined that that was but an incidental right, and, therefore, within the police power of the State; so that when the present proceeding was begun, the relator and its counsel relied upon the federal constitution to protect the relator against any impairment of the essential features of its contract as declared by this court.

In my affidavit herein I call attention to that fact in folio 45 of the record, which is quoted upon the annexed affidavit of Mr. Hodge, which I have read. Said quotation of itself shows the federal question upon which the relator relied in this proceeding, and clearly presents it when taken in connection with the facts just recited, all of which are contained more fully in my said affidavit and elsewhere in the record; it is a distinct and emphatic declaration of the grounds upon which we came to this court and to the court below, and are now appealing to the Supreme Court of the United States for relief, against the arbitrary act of the State of New York in first granting to the relator what it claims to be an irrevocable franchise, and, then without notice to the relator taking it away.

I was present at all of the arguments in this cause, including the argument upon the 11th day of February, 1911, before this court. On said last mentioned argument I have a very distinct recollection of the federal questions involved, including especially the clause of the federal constitution relating to the impairment of contracts, and I remember that it was discussed not only by Judge Parker, but also by Mr. Mooney in replying to him.

WHEREFORE, the relator prays that the relief asked for in the order to show cause, to which this affidavit is annexed and which is about to be presented to one of the judges of this court be granted.

WAYNE W. WILSON.

Sworn to before me
this 18th day of April, 1914.
ALEXANDER HOLTZOFF,
Notary Public, #1592.
New York County.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a writ of Mandamus,

vs.

THE EMPIRE CITY SUBWAY COMPANY, Ltd.,
Respondent.

State of New York,
County of New York, } ss.:

Alton B. Parker, being duly sworn, deposes and says that he was of counsel for the Relator-Appellant in the above-entitled matter, the decision of the Court of Appeals wherein is reported, in 201 N. Y., 321. That as such counsel deponent made

the principal argument for the relator-appellant in the Court of Appeals on the 7th day of February, 1911 (the replying argument being made by Mr. J. Aspinwall Hodge). That on such argument deponent pressed upon the attention of the Court the claim in which deponent had full faith and confidence, that by the Articles of Incorporation of the Relator, bearing date October 16, 1882; the passing of the resolution of April 10, 1883, by the Common Council giving the permission of the City to lay conduits and wires beneath the surface of the street; the written acceptance thereof by the Relator, bearing date April 16, 1883; the adoption of the motion of one of the members of the Common Council that the communication of the Lines Company accepting the grant of the City presented to the Board April 24, 1883, be taken from on file and printed in full in the City Record and in the minutes, together with the performance by Relator on the 18th day of May, 1883, of the condition imposed by the Ordinance at an expense of $300 of filing with the County Clerk maps, diagrams and tabular statements indicating the amount and position of the spaces in certain streets proposed to be occupied by it, constituted a contract and property not to be impaired or destroyed by the state or City because forbidden by Section 10 of Article 1 of the Federal Constitution. And also because Relator's property rights therein are protected by the provisions of the 14th amendment of the Federal Constitution. And further, deponent urged upon such argument that the passage by the Board of Estimate and Apportionment of the resolution revoking in terms the permission granted by the Common Council to the Relator on April 10, 1883, was in contravention of Section 10

of Article 1 of the Federal Constitution and, therefore, void. And further that such act was also illegal and void because it offended against the provisions of the 14th amendment of the Federal Constitution.

ALTON B. PARKER.

Sworn to before me this
17th day of April, 1914.

ROSCOE C. PECK,
Notary Public, 3079,
N. Y. County.

COURT OF APPEALS OF THE STATE OF NEW YORK.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY, Limited.

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Appellant,

THE EMPIRE CITY SUBWAY COMPANY, Limited,
Respondent.

State of New York,
County of New York, } ss.:

J. Aspinwall Hodge, being duly sworn, says he is the attorney and counsel for the relator herein and has been since the year 1905.

He took part in the argument in the Court of Appeals herein on the 7th day of February, 1911, the principal argument being presented by ALTON B. PARKER, Esq. On that occasion, both in the argument presented by Judge PARKER and that presented by this deponent and in the briefs presented by the relator, to wit: the main brief, the reply brief and the brief presented on motion for a reargument and also an intervening brief submitted by leave of the Court by Mr. Alexander S. Bacon, representing The Great Eastern Telephone Company, the principal stock holder of the relator, the constitutional guaranties, both state and federal, were relied upon, and it was especially called to the attention of the Court that the franchise granted to the relator by the state and city under the statutes of the state, supplemented by the ordinance of the city, was an irrevocable contract, protected by the clause in the constitution of the United States, prohibiting any state from impairing the obligation of contracts, and protected also by the constitutional guaranty contained in the XIV amendment of the federal constitution, and in Article 1, Sec. 6 of the state constitution, both of which provide against taking property without due process of law. The attention of the Court was expressly called to the fact that both this Court and the Supreme Court of the United States in previous litigation has determined a federal question involved in the passage of the so-called Subway Acts, but that the federal question here involved was quite distinct and different, although based upon the same clauses in the federal constitution, especially that referring to the impairment of the obligation of contracts.

The affidavit, which was in effect a petition for the writ of mandamus herein, sworn to by Wayne W. Wilson, the secretary of the relator, is a part of the record, and is found at folio 28. Therein Mr. Wilson asserts that the facts he sets forth and the documents he produced and annexed, are set forth, and produced, to "establish the validity and "the irrevocability of the Company's charter and "franchise, including its right to maintain, oper-"ate and lease low tension conductors in the streets "of the City of New York and its right to continue "to exercise all of its powers under its charter, "even if such franchises and powers were disputed "by the city or state."

In the brief submitted by the appellant, Point XII thereof raises the question of the protection by the aforesaid constitutional guaranties of the relator's franchise and rights and refers to the discussion in the preceding points as turning upon that question. This point is further emphasized and called to the attention of the court and passed upon in the brief on file with this court under paragraph entitled "H," which point reads as follows and was submitted on motion for reargument:

"H."

"There can be no valid revocation, even by the "State, except where such a right is reserved. "This point does not appear to have been consid-"ered by the Court. It is fully discussed in some "of the cases already cited, and in our former "brief, Points XI and XII, pages 109 to 111.

"Points A and E *supra* incidentally treat of this "matter. *Herein is involved the rights under the "state and federal constitutions.* See former brief, "Point XII, page 110."

The point was further discussed and emphasized in the aforesaid brief submitted by Alexander S. Bacon. A portion of said discussion contained in said brief is under the following heading:

"Does the relator's secondary franchise (ordi- "nance of April 10, 1883) constitute property? Is "it a contract or a permit? All the cases answer "this question in the affirmative, and hold that this "kind of property is protected by the federal con- "stitution, so that even the State Legislature it- "self cannot destroy or appropriate it without just "compensation through legal proceedings."

From the year 1905, when as an attorney and counsel for the relator, I applied for Writ of Mandamus to the city authorities (see 188 N. Y., 523) down to the present time and including especially the aforesaid argument in the Court of Appeals, on February 7, 1911, the mainstay and the point around which all arguments turned was the clause in the federal constitution which prohibited any state from impairing the obligation of contracts (which constitutional guaranty is only contained in the federal constitution) and upon the provision in the state and federal constitution relating to the taking of property without due process of law.

Notwithstanding these facts a brief has been served upon the relator's counsel in the Supreme

Court of the United States, where this case is now pending upon a writ of error, wherein it is claimed by the counsel for the respondent as follows:

"Upon the record it appears that the alleged re-"pugnancy of the revoking resolution to the con-"stitution of the United States was first raised in "the assignment of errors on the application for "the writ of error to review the judgment of the "Court of Appeals."

Notwithstanding the opinion of counsel for the relator that the record shows that said federal questions were clearly raised by the record and are therein shown by the opinion of Judge HAIGHT to have been discussed, considered and decided adversely to the relator, and out of abundant caution (this matter involving large interests, both public and private) this application is made for an amendment of the remittitur and for such other relief as may be proper in accordance with the practice followed by this court to the end that the relator may have presented without any question before the Supreme Court of the United States, question upon which this action turned in this court. No other application has been made to this court for this or similar relief.

The reason that an order to show cause is prayed for is that this cause is on the calendar of the Supreme Court of the United States, #370, and that cases as high as #337 have been argued. The Clerk of the Supreme Court of the United States has communicated with us and with other attorneys having cases between #370 and #393 on calendar, as well as with this deponent stating that cases between those numbers inclusive are likely to be reached during the week beginning

April 27th, as at present announced, is the last week of the term of the United States Supreme Court for this Spring and until October.

J. ASPINWALL HODGE.

Sworn to before me this
18th day of April, 1914.

ALEXANDER HOLTZOFF,
Notary Public, #1592,
New York County.

COURT OF APPEALS OF THE STATE OF NEW YORK.

In the Matter
of
The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY, Limited.

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Appellant,
THE EMPIRE CITY SUBWAY COMPANY, Limited,
Respondent.

State of New York,
County of ~~New York~~ Albany, } ss.:

I, Charles T. Russell, being duly sworn, say: That I was of counsel for the respondent, The Em-

pire City Subway Company, Limited, in the above-entitled matter and was present as such *during the greater part* of the argument of the appeal in the Court of Appeals. Judge Parker was arguing the case for the relator-appellant when I reached the court room, and during the time that I was there I heard Judge Parker argue that the permission of the Common Council was a contract, but according to my best recollection neither he nor Mr. Hodge made any reference to the Federal Constitution or to any Federal questions being involved in the proceeding. I was present throughout the whole of Mr. Hodge's argument.

CHARLES T. RUSSELL.

Sworn to before me this
22nd day of April, 1914.

HOWARD HENDRICKSON,
Notary Public,
Albany County, N. Y.

COURT OF APPEALS OF THE STATE OF NEW YORK.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY, Limited.

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Appellant.

THE EMPIRE CITY SUBWAY COMPANY, Limited,
Respondent.

State of New York,
County of New York, } ss.:

I, Edmund L. Mooney, being duly sworn, say: I was of counsel for the respondent in the above-entitled matter and orally argued in its behalf the appeal in the Court of Appeals, the opinion of which is reported in 201 N. Y., 321. I did hear on that occasion Judge Parker argue orally that the permission of the Common Council was a contract, but I did not hear Judge Parker make any oral argument based on the Federal Constitution or that a Federal question was involved in the matter. I did not make any argument myself on that subject before the Court of Appeals, nor did Mr. Hodge in reply. I certainly would have done so had Judge

Parker or Mr. Hodge presented any such question in a way to indicate that it was involved.

I am making this affidavit based on the recollection of an argument that took place upwards of three years ago, and I have a great deal of diffidence in asserting what did or did not take place on the oral argument, but the Federal question which is now attempted to be interjected into the case would have been of such importance to me and to my client that I am sure that I would have remembered such a point. I believe that my recollection is as good as that of Judge Parker or Mr. Hodge.

I have re-examined the main brief and the reply brief of the appellant, since the motion papers were served and I do not find therein any reference whatever to any Federal question, unless it can be spelled out from Point XII of the appellant's brief, which I have had copied in extenso and annexed hereto.

It is true that in the brief filed by Alexander S. Bacon, who was allowed to file a brief on behalf of the Great Eastern Telephone Company, the Federal question was referred to, but I respectfully submit that that forms no part of the argument or of the record in behalf of the appellant, nor is the Great Eastern Telephone Company a party to the review in the United States Supreme Court.

On the motion for reargument there was filed a brief by the appellant which contained an isolated paragraph designated "H" set forth in Mr. Hodge's moving affidavit, but I respectfully submit that the motion for reargument is not to be considered as a part of the decision of this Court from which an appeal has been taken to the Supreme Court of the United States.

The primary question that was decided in this Court was stated by Judge Haight, as follows:

> "In view of the fact that the relator has "never attempted to engage in the business of "electric lighting, or of supplying transmitters "and receivers for telephonic communication, "or of instruments for telegraphing, and has "never been granted a franchise to occupy the "conduits therefor, the contention that it may "now do so is under the old resolution of the "Common Council of 1883, we think, would be "giving to it powers not embraced in or con- "templated by the resolution and should not "now be adopted or sanctioned."

It is not true that "the mainstay and the point around which all the argument turned was the clause in the Federal Constitution which prohibited any State from impairing the obligation of contracts" on the argument of the appeal in this court. Annexed hereto is a statement of the headings of the twenty-one points set forth in the appellant's brief on that appeal.

POINT I.

The fundamental object of the application for the writ is, and the result of its issuance would be, the compelling The Empire Company to accord space in order that the Lines Company may thereupon apply for a permit from the city.

POINT II.

The Empire Company cannot usurp the functions of the city authorities, the Attorney General or the

courts by passing upon the validity of the Lines Company's grant from the State and its franchise to operate electric conductors in the city.

POINT III.

Neither The Empire Company, the city or the State can be damaged by the issue of a writ of mandamus directed to The Empire Company to compel it to accord space to the Lines Company.

POINT IV.

The contention of The Empire Company that there is controlling authority for the proposition that it can raise the issues that we maintain can only be raised by the Attorney General is without merit.

POINT V.

Where The Empire Company refuses just and equal facilities to all authorized companies there is express statutory authority for the writ of mandamus prayed for by the Lines Company.

POINT VI.

The Lines Company is an existing corporation having lawful power to operate electric conductors in the City of New York.

POINT VII.

The subway acts did not deprive the Lines Company of its fundamental right to lay its electrical

conductors in the streets, although it has been held, that in the exercise of the police power, they deprived the company of its right to build its own conduits.

POINT VIII.

The right to operate electrical conductors beneath the streets of a municipality is a franchise, a contract and a grant.

POINT IX.

The grant to the Lines Company was complete upon acceptance, and vested the grantee with a present interest, limited as to the city, only by the conditions expressly imposed and subject only to the police power of the State.

POINT X.

The Lines Company by its acceptance of the grant from State and city, followed by the expenditure of money, the incurring of obligations, entering into contracts, and by attempting to build its conduits and to lay its wires in the conduits of The Empire Company, has acquired the same rights that the actual construction of conduits would give it.

POINT XI.

The attempted revocation was ineffective, because it was an act of the city, and no power of revocation had been delegated by the State to the city, and no right to revoke its consent was reserved by the city.

POINT XII.

The grant by the State accepted by the Lines Company is protected by the constitutional guarantees, and the resolution of the Board of Estimate and Apportionment of April, 1906, was a nullity.

POINT XIII.

The attempted revocation by the city (one of the interested parties) was wholly ineffective because without notice to the Lines Company.

POINT XIV.

The State and city by acts of recognition and acquiescence have frequently and recently ratified the grant to the Lines Company of its franchises.

POINT XV.

The Lines Company has fulfilled every requirement of its charter and every condition of its franchise and on the merits has not been guilty of nonuser or laches.

POINT XVI.

The act of 1892 was a mandate from the State which not only excused any delay of the Lines Company in exercising its franchise rights, but compelled it to delay, and in no event was State, city or The Empire Company injured by the delay.

POINT XVII.

The Lines Company has never assigned its franchise.

POINT XVIII.

The writ having been denied as a matter of law, and not in the exercise of discretion, all questions relating to the public interests, the desirability of the Lines Company as a tenant of The Empire Company, or like considerations, are eliminated, even if they could be otherwise raised.

POINT XIX.

The propriety of an alleged intention of the Lines Company to lease its conductors to another corporation cannot be raised as an issue on this appeal.

POINT XX.

The answering affidavits contain no denial that there is not sufficient unoccupied and available space for all the conductors of the Lines Company referred to in its application.

POINT XXI.

The answering affidavits raise no issue of material fact, by evidence of any probative value, and hence a peremptory writ must issue.

Since this case was decided by this Court The New York Electric Lines Company has brought an action in the Supreme Court for the County of New York against the Mayor, etc., of the City of New York, in which case the appellant, The New York Electric Lines Company, was and is represented by Mr. Bacon, and not by Mr. Hodge, The Empire City Subway Company being a party defendant to that action. In the complaint in that action The

New York Electric Lines Company has set forth that the proceedings of the Board of Estimate and Apportionment revoking or attempting to revoke the permission was contrary to the Constitution of the United States, and in that way the Federal question was directly presented in that case. That case has been tried and decided adversely to the New York Electric Lines Company on the merits and an appeal is now pending to the Appellate Division. Counsel in that case has stated in open court that the object of bringing that case was that the Federal question could be adequately presented in the Supreme Court of the United States eventually.

The decision of this Court in this case was handed down in March, 1911. On or about May 6, 1911, the appellant made a motion in this Court:

> "That a reargument of the appeal herein be "had, upon the ground, that the questions de- "cisive of the case and duly submitted by coun- "sel have been overlooked by the Court and "that the decision is in conflict with controlling "decisions and considerations, to which the at- "tention of the Court was not drawn, and
>
> "In case said motion for reargument should "be denied herein that an order be made amend- "ing the said remittitur, so as to provide that "the denial of the writ of mandamus applied "for shall be without prejudice to any action "or proceedings which may be taken by the ap- "plicant to establish its rights."

That motion was wholly denied by this Court, 202 N. Y., 587.

The appellant did not apply for a writ of error until October, 1912. The printed record in the

Supreme Court of the United States was prepared and served on December 12, 1912. Subsequently, and on April 28, 1913, the appellant in this court, who is the plaintiff-in-error in the United States Supreme Court, made a motion to advance the cause for hearing, which motion was denied by the Supreme Court of the United States. Notwithstanding all of the above mentioned proceedings the question now attempted to be presented was at no time suggested. The appellant has made no attempt to present the question until after the brief in behalf of The Empire City Subway Company, Ltd., which is the defendant-in-error in the Supreme Court, was served on counsel for The New York Electric Lines Company on April 16, 1914, and filed in the office of the Clerk of the Supreme Court of the United States on April 17, 1914, all of which is three years after the decision of this Court in this case.

EDMUND L. MOONEY.

Sworn to before me this
22nd day of April, 1914.

HOWARD HENDRICKSON,
Notary Public,
Albany County, N. Y.

POINT XII.

The grant by the State accepted by the Lines Company is protected by the constitutional Guarantees, and the resolution of the Board of Estimate and apportionment of April, 1906, was a nullity.

This proposition is sustained by the cases we have already quoted under several of the foregoing points, notably Points II, VI, VIII, IX, X and XI.

We believe it is scarcely necessary to discuss this proposition, not only because the three preceding points dispose of the question involved; but also because the proposition that the contract or grant is protected by the constitutional guarantees has been so often recognized in the previous litigation, both in the SQUIRE and ELLISON cases.

In MAYOR vs. SECOND AVENUE RAILROAD COMPANY, 32 N. Y., 261, this Court said:

> "Assuming that the Common Council had "power to make the grant, then ITS ACCEPT-"ANCE by Pearsall and his associates, signi-"fied by the execution of the agreement with "the conditions annexed thereto, and the duties "and obligations resulting therefrom, invested "the latter with the right of property in the "franchise WHICH THE COMMON COUN-"CIL COULD NOT TAKE AWAY OR IM-"PAIR BY ANY SUBSEQUENT ACT OF "ITS OWN."

Even when there is a condition which the holder of the franchise has broken, forfeiture must be enforced in the courts, as is held in DUSENBURY vs. N. Y., W. & C. TRACTION COMPANY, quoted under Point XI, SUPRA.

This is the law in other jurisdictions.

In NEWPORT, ETC., R. CO. vs. HAMPTON, ETC., R. CO., 102 Va., 795, it was held (page 807):

> "If from any cause Appellee has forfeited "its right to lay its tracks and operate its cars

"on and over Mellen Street, such forfeiture "cannot be taken advantage of in a private "action, and can only be enforced on behalf of "the public at the election of the State" (citing cases in this and other States).

In Fletcher vs. Peck, 6 Cranch, 87, the legislature of Georgia attempted to annul a grant of State lands made by a previous legislature.

The Court held that the grant under the first enactment constituted, when accepted, a contract within the protection of the Federal Constitution and that the second enactment, being an impairment of the contract, was void.

In Buffet vs. Grt. Western R. R. Co., 25 Ill., 310, 314, we read:

"It is not doubted that the legislature is pro-"hibited, by the constitution, from exercising "the power of judicially determining and de-"claring that a contract is forfeited, between "individuals. And no reason can be perceived "why it should be exercised when the State it-"self is a party to the agreement. The power, "in either case, is, by the constitution devolved "upon the courts, and is consequently prohib-"ited to the legislative department. It then "follows that this act, so far as it may have "been designed to declare a forfeiture of the "charter of the Great Western R. R. Co. and "to dissolve that party, is prohibited by the "court and is inoperative and void."

Exhibit B.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York held at the Capitol in the City of Albany, on the twenty-eighth day of April, A. D., 1914.

Present—Hon. WILLARD BARTLETT, Chief Judge, presiding.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY, Limited.

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Appellant,
THE EMPIRE CITY SUBWAY COMPANY,
Respondent.

An order to show cause having been granted by the Hon. Willard Bartlett, Chief Judge of this Court, requiring the respondent to show cause why this Court or its Chief Judge should not make a certificate in the above entitled proceeding as in

said order to show cause is more fully stated; why the remittitur therein should not be amended by adding thereto said certificate; why a duplicate original of said certificate or a certified copy thereof should not be delivered to the relator's attorney; and why the appellant should not have such other further like or different relief as might be just; and the motion upon said order to show cause regularly coming on to be heard,

Now, on reading and filing the order to show cause aforesaid, dated the 18th day of April, 1914, the affidavit of Wayne W. Wilson verified April 18, 1914, the affidavit of Alton B. Parker verified April 17, 1914, and the affidavit of J. Aspinwall Hodge verified April 18, 1914, in support of said application; and the affidavits of Charles T. Russell and Edmund L. Mooney, verified April 22, 1914, read in opposition thereto and, after hearing J. Aspinwall Hodge, Esq., of counsel for the relator-appellant for the motion, and Edmund L. Mooney, Esq., of counsel for the respondent in opposition thereto, and due deliberation having been had, it is

ORDERED, that the Supreme Court of the State of New York in and for the County of New York, be and it is hereby requested to return the remittitur herein to this Court; and that upon the return thereof the said remittitur be, and the same is, hereby amended by adding thereto and incorporating therein the following statement:

"Upon the argument of the appeal in this cause "before the Court of Appeals, there was submitted "to the Court by counsel for the appellant and in "its behalf, a brief containing the following point,

POINT XII.

The grant by the State accepted by the Lines Company is protected by the constitutional guarantees, and the resolution of the Board of Estimate and Apportionment of April, 1906, was a nullity.

This proposition was sustained by the cases we have already quoted under several of the foregoing points, notably, Points II, VI, VIII, IX, X and XI. We believe it is scarcely necessary to discuss this proposition, not only because the three preceding points dispose of the question involved; but also because the proposition that the contract or grant is protected by the constitutional guarantees has been so often recognized in the previous litigation, both in the *Squire* and *Ellison* cases.

In *Mayor* vs. *Second Avenue Railroad Company*, 32 N. Y., 261 this Court said:

> "Assuming that the Common Council had "power to make the grant, then its *acceptance* "by Pearsall and his associates, signified by the "execution of the agreement with the condi- "tions annexed thereto, and the duties and ob- "ligations resulting therefrom, invested the lat- "ter with the right of property in the franchise "*which the Common Council could not take* "*away or impair by any subsequent act of its* "*own.*"

Even when there is a condition which the holder of the franchise has broken, forfeiture must be enforced in the Courts, as is held in *Dusenbury* vs. *N. Y. W. & C. Traction Co.*, quoted under Point XI *supra*.

This is the law in other jurisdictions.

In *Newport, etc., R. Co.* vs. *Hampton, etc., R. Co.*, 102 Va., 795, it was held (page 807):

"If from any cause appellee has forfeited its "right to lay its tracks and operate its cars on and "over Mellen Street, such forfeiture cannot be tak- "en advantage of in a private action, and can only "be enforced on behalf of the public at the election "of the State" (Citing cases in this and other States).

In *Fletcher* vs. *Peck*, 6 Cranch, 87, the legislature of Georgia attempted to annul a grant of State lands made by a previous legislature.

The Court held that the grant under the first enactment constituted, when accepted, a contract within the protection of the Federal Constitution and that the second enactment, being an impairment of the contract, was void.

In *Buffet* vs. *Grt. Western R. R. Co.*, 25 Ill., 310, 314, we read:

> "It is not doubted that the legislature is pro- "hibited, by the constitution, from exercising "the power of judicially determining and de- "claring that a contract is forfeited between "individuals. And no reason can be perceived "why it should be exercised when the State it- "self is a party to the agreement. The power, "in either case, is, by the constitution devolved "upon the courts, and is consequently prohibit- "ed to the legislative department. It then fol- "lows that this act, so far as it may have been "designed to declare a forfeiture of the charter "of the Great Western R. R. Co. and to dissolve

"that party, is prohibited by the court and is "inoperative and void."

And it is further ordered that upon the amendment of the remittitur as aforesaid it be returned to the Supreme Court in and for the County of New York.

(A copy).

JNO. H. REYNOLDS,
Deputy Clerk.

Seal. Court of Appeals,
State of New York.

Exhibit C.

And afterwards, to wit, on April 22nd, 1914, a motion having been made, on the return of an order to show cause, by the attorney for the appellant, for an amendment of the remittitur herein, which motion was "granted to the extent of amending the "remittitur so, as to recite therein the submission "of the 12th point in the appellant's brief, setting "forth said point in full;" remittitur is hereby amended in accordance with the order of this Court dated April 28th, 1914, attached hereto and made a part hereof.

(Here follows the order printed as Exhibit B *supra.*)

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No. 63.

Office Supreme Court, U. S.
FILED
MAY 6 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1912.

~~No. 629.~~

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Plaintiff-in-Error,

vs.

EMPIRE CITY SUBWAY COMPANY, (Limited),
Respondent-Defendant-in-Error.

SUPPLEMENTAL BRIEF OF RESPONDENT-DEFENDANT-IN-ERROR UPON THE QUESTIONS ATTEMPTED TO BE RAISED BY THE SO-CALLED AMENDED REMITTITUR.

EDMUND L. MOONEY,
Attorney for Defendant-in-Error,
37 Wall Street,
New York City.

EDMUND L. MOONEY,
CHARLES T. RUSSELL,
FREDERICK A. CARD,
Of Counsel.

B. H. TYRRELL, PRINTER, 206-8 FULTON STREET, NEW YORK.

Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 829.

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Plaintiff-in-Error,

vs.

EMPIRE CITY SUBWAY COMPANY,
Respondent-
Defendant-in-Error.

Supplemental Brief of Respondent-Defendant-in-Error upon the questions attempted to be raised by the so-called amended remittitur.

POINT I.

The Court of Appeals of the State of New York had no power to amend the remittitur after the lapse of three years from the time this Court had issued its writ of error.

In this case, the certification of Point 12 of the relator's brief was made by the Court of Appeals

three years after the writ of error had been granted by this Court and long after the record and proceedings had been transferred to this Court. When the certification was made, therefore, the Court of Appeals of the State of New York did not have the case before it and had lost control of the record, so that said certification could not become a part of the record. In *Home for Incurables* vs. *the City of New York*, 187 U. S. 155, it was held that a certificate of the Chief Judge of the Court of Appeals of the State of New York to the effect that Federal questions were raised and decided, made at a time when the case was not before it or under its control, was not a part of the record and could not give this Court jurisdiction to determine a Federal question not appearing otherwise from the record to have been brought to the attention of the State Court, Page 158. The certification of the brief was also improper because it was made after the rendition of final judgment without a rehearing upon the merits: *Miller* vs. *Cornwall Railroad Company*, 168 U. S. 131-134; *Weber* vs. *Rogan*, 188 U. S. 10-14.

POINT II.

The so-called amended remittitur, containing Point 12 of the Relator's brief in the Court of Appeals, is no part of the record, properly speaking, before this Court, and should not be considered in determining whether any Federal question was raised or decided in the Court of Appeals of the State of New York.

The certification of Point 12 of the Relator's brief, although in the form of an order purporting to amend the remittitur, merely certifies that Point 12 and the matter contained therein was submitted to the Court on the argument of the appeal. It certainly can have no other or greater effect than to present to this Court part of the argument of counsel, verified as correct by the certificate or order.

It has several times been held by this Court that arguments of counsel form no part of the record. *Gibson* vs. *Chouteau*, 75 U. S. (8 Wall.) 314-318; *Sayward* vs. *Denny*, 158 U. S., 180-184.

In N. Y. C. & H. R. R. R. Co. vs. *City of New York*, 186 U. S. 269, the appellant, in an attempt to show the raising of a Federal question, relied upon a copy of its brief, certified by the Chief Judge of the Court of Appeals of the State of New York, as containing certain matters. In the opinion of this Court last cited the case of *Zadig* vs. *Baldwin*, 166 U. S. 485, is cited and quoted from as showing that the brief did not become a part of the record and could not raise a Federal

question when the record did not disclose that it was otherwise raised. Hence, the brief is not to be considered as a part of the record in determining whether a Federal question was raised and decided.

Whatever may be considered as to the effect of the briefs submitted to the State Court, it seems to be settled in this Court that they cannot, in themselves, be considered as sufficient to raise a Federal question not otherwise properly appearing to have been raised from the record.

As we have noted, they do not become a part of the record proper. In *Glenn* vs. *Garth, 147 U. S., 360*, it was said in the opinion of this Court, Page 370: "nor can the contention of counsel, that the Virginia Statutes should be construed according to their views, be treated as the equivalent of the express assertion of a right arising under the Constitution or laws of the United States."

The reason for the insistence of this Court that the Federal question shall be raised in the Court below and the fact that it was raised clearly appear from the record, is stated in the opinion of Mr. Justice Taney in *Grand Gulf R. R. & Banking Co., etc.* vs. *Marshall*, 53 U. S. (12 Howard) 165, to be, that if the appellant omits to raise the point properly on the record, there is no reason to permit him to harass the adverse party by a writ of error to this Court, when for aught that appears in the record the judgment of the State Court might have been in his favor if its attention had been directed to the question. Hence, the rule is just that the omission to raise the question properly in the record cannot be cured by the briefs or arguments of counsel, and certainly it should not be held to be cured by the certification of a por-

tion of the brief of the relator in the Court below made three years after the granting of the writ of error.

POINT III.

Assuming, for the sake of argument, that Point 12 of the Appellant's brief in the Court of Appeals is before this Court, it did not in reality raise any Federal question.

In N. Y. C. & H. R. R. R. Co. vs. *The City of New York*, 186 U. S., 269, a copy of appellant's printed brief had been certified by a Judge of the Court below. It was said:

> "But assuming without intimating an opinion to that effect, that the raising of a Federal question in the brief might be sufficient, it is well settled in this court that it must be made to appear that some provision of the Federal, *as distinguished from the state*, Constitution was relied upon, *and that such provision must be set forth.*" (Italics ours.)

This court quoted from the brief so submitted and concluded that it did not properly raise a Federal, as distinguished from a state question (Pages 272 and 273). To warrant a review by this court, it must appear from the record that the appellant specifically claimed and set up in the State Court, rights under the Constitution of the United States. *Chicago & Northwestern Railway Co.* vs. *City of Chicago*, 164 U. S., 454-456. It is not sufficient

that the constitutionality of the law be raised, for that only raises the constitutionality under the State Constitution. *Kansas Endowment & Benevolent Association* vs. *State of Kansas*, 120 U. S., 103-104; *Yazoo & Mississippi Valley Railroad Co.* vs. *Adams*, 180 U. S., 1. Nor that the question raised is one of the construction of a State Statute and not its validity under the Federal Constitution. *Baltimore & Potomac R. R. Co.* vs. *Hopkins*, 130 U. S., 210; *Weber* vs. *Rogan*, 188 U. S., 10-14.

In this case, the Court has certified only Point 12 of the appellant's brief in that court, from which it is fair to assume that the Federal question, if raised at all, was raised therein.

Point 12 consists only of two pages. On the first page it is stated in a headline that the grant by the state, accepted by the Lines Company, is protected by the "Constitutional guarantees" and the Resolution of the Board of Estimate and Apportionment of April, 1906 was a nullity. The case of *Mayer* vs. *Second Ave. Railways Co.*, 32 N. Y., 261 is cited to support this proposition, as well as the case of *Dusenbury* vs. *New York &c. Traction Co.*, 46 App. Div., 267. On the following page a Virginia case and an Illinois case are cited and quoted from. The statement quoted from the headline and the cases cited to support the proposition apparently relate only to the State Law and not to the Constitution of the United States. The words "Constitutional Guarantees" do not properly refer to the guarantees of several constitutions, but, on the contrary, to several guarantees of the same constitution, and cannot be properly construed to refer to the Constitution of the United States in connection with the Consti-

tution of the State of New York. The only other matter contained in said Point 12 is as follows:—

> "*In Fletcher* vs. *Peck*, 6 Cranch, 87, the Legislature of Georgia attempted to annul a grant of State lands made by a previous Legislature.
>
> "The Court held that the grant under the first enactment constituted, when accepted, a contract within the protection of the Federal Constitution and that the second enactment, being an impairment of the contract, was void."

This statement of what was decided in *Fletcher* vs. *Peck*, is rather a quotation than an argument, and cannot, we contend, amount to a claim of right under the Constitution of the United States, or take the place of the specific claim under such Constitution which is required to raise a Federal Question. *Chicago & Northwestern Railway Co.* vs. *the City of Chicago*, 164 U. S., 454, 456; *Layton* vs. *State of Missouri*, 187 U. S., 356.

POINT IV.

The Brief of the plaintiff-in-error upon the questions attempted to be raised by the so-called amended remittitur, does not meet our contentions.

The plaintiff-in-error applied to the State Court for a formal certificate stating that a Federal question had been raised and determined, but succeeded only in obtaining a certification of Point XII of its Brief in the State Court. While it is stated on p. 4 of the supplemental brief that

Point XII is now made a part of the record,—no cases are cited to sustain this claim, the only cases cited being those cited on page 2 which are to the effect that the opinion of the State Court,—or its certificate, where there is no opinion, may be considered for the purpose of aiding in determining whether a Federal question was raised, where there is no doubt as to it, but cannot import such question into the record or give jurisdiction to review where it is not otherwise raised by the record.

The plaintiff-in-error argues that the order is in the nature of a certificate and that it will inform the Court, as a certificate would, that a Federal question was raised and argued, yet does not rely on it to show this. The brief shows, that relator, fearing the Federal question was not raised by the record, tried to cure this defect by obtaining a formal certificate and failing to obtain it now seeks to give an unwarranted effect to a mere certification of a part of its brief in the State Court.

We contend now, as heretofore, that no Federal question was raised by the record, that the opinion of the Courts below did not pass upon any such question nor did the brief raise it.

Respectfully submitted,

Edmund L. Mooney,
Attorney for defendant-in-error,
37 Wall Street,
New York City.

Edmund L. Mooney,
Charles T. Russell,
Frederick A. Card,
of Counsel.

13

Office Supreme Court U. S.
OCT 5 1914
JAMES D. MAHER
Clerk

Supreme Court of the United States

THE NEW YORK ELECTRIC LINES COMPANY, Relator-Plaintiff-in-Error, against EMPIRE CITY SUBWAY COMPANY, Respondent-Defendant-in-Error.	October Term, 1913— No. 370.

PLEASE TAKE NOTICE that upon the affidavit of Wayne W. Wilson, verified on the 1st day of October, 1914, the motion of which the annexed is a copy will be submitted to the Supreme Court of the United States, at the Capitol, in the City of Washington, D. C., on the 12th day of October, 1914, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for a writ of certiorari for diminution of the record, directed to the Supreme Court of the State of New York, in and for the County of New York, and for

such other and further relief as to the Court may seem just.

New York, October 1, 1914.

J. Aspinwall Hodge,
Attorney for Plaintiff-in-Error,
5 Nassau Street,
Borough of Manhattan,
New York City.

Alton B. Parker,
of Counsel,
111 Broadway,
New York City.

To
Mr. Edmund L. Mooney,
Attorney for Defendant-in-Error,
37 Wall Street,
Borough of Manhattan,
New York City.

Service of the foregoing notice and the motion and affidavit annexed thereto is hereby admitted this 2nd day of October, 1914.

EDMUND L. MOONEY,
Attorney for Defendant-in-Error,
37 Wall Street,
New York City.

SUPREME COURT OF THE UNITED STATES.

THE NEW YORK ELECTRIC LINES COMPANY, Relator-Plaintiff-in-Error, against EMPIRE CITY SUBWAY COMPANY, Respondent-Defendant-in-Error.	October Term, 1913— No. 370.

Now comes the plaintiff-in-error, by J. Aspinwall Hodge, its attorney, and moves this Honorable Court, for a writ of certiorari for diminution of the record, directed to the Supreme Court of the State of New York, in and for the County of New York, directing said Court to return to this Court, the record and proceedings in this case, with all things concerning the same, as fully and entirely as they remain of record in said Supreme Court of the State of New York, in and for the County of New York, including the order made in this cause by the Court of Appeals of the State of New York, on the 28th day of April, 1914, and the amendment made to the remittitur herein pursuant to said order, not now contained in the transcript of the record herein, filed in this Court, and for such other and further relief as to the Court may seem just.

J. Aspinwall Hodge,
Attorney for Plaintiff-in-Error,
5 Nassau Street,
Borough of Manhattan,
New York City.

ALTON B. PARKER,
of Counsel,
111 Broadway,
New York City.

SUPREME COURT OF THE UNITED STATES.

THE NEW YORK ELECTRIC LINES COMPANY, Relator-Plaintiff-in-Error, against EMPIRE CITY SUBWAY COMPANY, Respondent-Defendant-in-Error.	October Term, 1913— No. 370.

State of New York, County of New York, } ss.:

Wayne W. Wilson, being duly sworn, deposes and says:

I. He is the Secretary of the New York Electric Lines Company, the plaintiff-in-error herein.

II. Heretofore and on or about the 16th day of October, 1912, a writ of error was allowed by the Honorable Charles E. Hughes, one of the Associate Justices of this Court, and issued out of and under the seal of this Court, directed to the Supreme Court of the State of New York, in and for the County of New York, to bring up for review the final order of the Court of Appeals of the State of New York, in this suit.

III. Thereafter and on or about the 25th day of October, 1912, a transcript of the record herein, duly certified by the Clerk of the Supreme Court of the State of New York, in and for the County of New York, was filed in this Court, pursuant to said writ of error.

IV. Thereafter and on or about the 28th day of April, 1914, an order was made by the Court of Appeals of the State of New York, directing that the Supreme Court of the State of New York, in and for the County of New York, be requested to return the remittitur herein to said Court of Appeals, and that the said remittitur be amended by adding thereto and incorporating therein certain statements set forth in said order, as appears by the report in 211 New York Reports, wherein it is stated:

> "Motion to amend remittitur so as to show "the submission in appellant's brief of a point "involving a question under the Federal Con- "stitution granted."

V. Thereafter the Supreme Court of the State of New York, in and for the County of New York, returned the said remittitur to the said Court of Appeals, and thereupon the said remittitur was amended by adding thereto and incorporating therein the said statements and the said order. Thereafter the said remittitur, as amended as aforesaid, was returned by the said Court of Appeals to the Supreme Court of the State of New York, in and for the County of New York. The said remittitur is now on file in said court. A copy of said order of the Court of Appeals, and of said amendment to the said remittitur are hereunto annexed, marked Exhibits A and B, respectively and made a part of this affidavit.

VI. The transcript of the record filed herein in this Court, does not contain the said order or the said amendment to the remittitur, as the record was filed in this Court prior to the time of the

making of the said order and of the said amendment. Unless said order and said amendment are included in the transcript of the record herein, the said transcript will not be full and complete.

VII. Inasmuch as it was expected that this cause would be reached for argument in this Court last spring, and there was therefore not sufficient time to formally amend the record then, the following stipulation was entered into between the attorneys for the respective parties and filed with the Clerk of this Court:

"IT IS HEREBY STIPULATED by the counsel for the respective parties in the above entitled case:

"A. That annexed hereto, marked 'Exhibit A,' is an order to show cause granted by the Chief Judge of the Court of Appeals of the State of New York, dated the 18th day of April, 1914, returnable before the Court of Appeals, on the 22nd day of April, 1914, together with the affidavits in support of said order to show cause, and the affidavits submitted in opposition to the motion upon said order to show cause.

"B. That annexed hereto, marked 'Exhibit B' is a copy of an order made by the Court of Appeals on the 28th day of April, 1914.

"C. That after the entry of the last mentioned order, the Clerk of the Supreme Court of the State of New York, returned the remittitur to the said Court of Appeals, and thereupon there was annexed to the said remittitur the papers marked 'Exhibit C.'

"D. That this stipulation, together with the papers hereto annexed may be filed as part of the record

before this Court, and may be handed to the Court on or before the argument herein, with the same effect and no other as if a writ of certiorari had been issued out of this Court to the Supreme Court of New York, directing a return to this Court of the above mentioned papers, and as if the above mentioned papers had been so returned; but it is stipulated that none of the aforesaid stipulations or any part of them shall be deemed or construed to be any waiver of the right of the respondent to object, which it now does, and may repeat upon the argument herein, to wit:

"That the Court of Appeals of the State of New York had no power or authority to direct the return of said remittitur or to amend the same, or return the same to the Supreme Court of the State of New York; that this Court upon the return should not, under the practice in such cases prevailing, consider the said papers or any of them, as properly part of the record herein.

"IT IS FURTHER STIPULATED, UNDERSTOOD AND AGREED, that the respondent herein shall be in the same position before this Court in respect to all objections that it would occupy, if, upon the taking of each of the foregoing steps and proceedings, all rights had been fully reserved to the respondent to make objection before this Court at this time, and to repeat the same on the argument herein, to each of the aforesaid steps and proceedings, and with the same effect as if said objection or objections had been taken at the time the said steps, motions, proceedings and returns were made.

"IT IS ALSO UNDERSTOOD AND AGREED that the relator will forthwith cause this stipula-

tion, together with the exhibits hereto annexed, to be printed and presented to this Court on or before the argument herein, and that the respondent will not object to a motion or request by the relator to the Court to accept the same as part of the record, subject, however, to each and all of the aforesaid objections, and also subject to all objections as to the effect of the said papers upon the rights of the parties hereto.

"IT IS FURTHER STIPULATED that the relator hereby consents, and will consent upon the argument that counsel for the respondent may file or hand to the Court with its permission any additional brief that he may desire dealing with the question raised by this stipulation, and that the relator will deliver a copy of any brief which it may desire to present (with the Court's permission) on or before the argument upon the said question, to the respondent's counsel, on Monday the 4th instant, and the respondent on its part will cause to be delivered to the relator's counsel, on Tuesday the 5th instant, a copy of any brief upon said question which it proposes to present to the Court on or before the argument.

"Dated, May 1, 1914.

J. ASPINWALL HODGE,
Atty. for Relator-Plaintiff-in-Error.

EDMUND L. MOONEY,
Atty. for Respondent-Defendant-in-Error."

But inasmuch as the case was not reached during the term last past, it is desired to formally amend the record in this cause in accordance with the rules and practice of this court, so as to include in said record the remittitur as amended by the Court of Appeals of the State of New York.

VII. This application could not have been made heretofore, inasmuch as the order directing the amendment of the remittitur was not made until the 28th day of April, 1914, and the remittitur as amended was not returned to the Supreme Court of the State of New York in and for the County of New York, until the 4th day of May, 1914.

WAYNE W. WILSON.

Sworn to before me this
1st day of October, 1914.

ALEXANDER HOLTZOFF,
Notary Public No. 1592,
New York County.

EXHIBIT A.

Order of Court of Appeals Amending Remittitur.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York held at the Capitol in the City of Albany, on the twenty-eighth day of April, A. D. 1914.

Present—Hon. WILLARD BARTLETT, Chief Judge, presiding.

In the Matter

of

The Application of THE NEW YORK ELECTRIC LINES COMPANY for a Writ of Mandamus directed to the EMPIRE CITY SUBWAY COMPANY, Limited.

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Appellant,

THE EMPIRE CITY SUBWAY COMPANY,
Respondent.

An order to show cause having been granted by the Hon. Willard Bartlett, Chief Judge of this

Court, requiring the respondent to show cause why this Court or its Chief Judge should not make a certificate in the above entitled proceeding as in said order to show cause is more fully stated; why the remittitur therein should not be amended by adding thereto said certificate; why a duplicate original of said certificate or a certified copy thereof should not be delivered to the relator's attorney; and why the appellant should not have such other further like or different relief as might be just; and the motion upon said order to show cause regularly coming on to be heard.

Now, on reading and filing the order to show cause aforesaid, dated the 18th day of April, 1914, the affidavit of Wayne W. Wilson verified April 18, 1914, the affidavit of Alton B. Parker verified April 17, 1914, and the affidavit of J. Aspinwall Hodge verified April 18, 1914, in support of said application; and the affidavits of Charles T. Russell and Edmund L. Mooney, verified April 22, 1914, read in opposition thereto and, after hearing J. Aspinwall Hodge, Esq., of counsel for the relator-appellant, for the motion, and Edmund L. Mooney, Esq., of counsel for the respondent in opposition thereto, and due deliberation having been had, it is

ORDERED, that the Supreme Court of the State of New York in and for the County of New York, be and it is hereby requested to return the remittitur herein to this Court; and that upon the return thereof the said remittitur be, and the same is, hereby amended by adding thereto and incorporating therein the following statement:

"Upon the argument of the appeal in this cause "before the Court of Appeals, there was submitted

"to the Court by counsel for the appellant and in "its behalf, a brief containing the following point:"

POINT XII.

The grant by the State accepted by the Lines Company is protected by the constitutional guarantees, and the resolution of the Board of Estimate and Apportionment of April, 1906, was a nullity.

This proposition was sustained by the cases we have already quoted under several of the foregoing points, notably, Points II, VI, VIII, IX, X and XI. We believe it is scarcely necessary to discuss this proposition, not only because the three preceding points dispose of the question involved; but also because the proposition that the contract or grant is protected by the constitutional guarantees has been so often recognized in the previous litigation, both in the *Squire* and *Ellison* cases.

In *Mayor* vs. *Second Avenue Railroad Company*, 32 N. Y., 261 this Court said:

> "Assuming that the Common Council had "power to make the grant, then its *acceptance* "by Pearsall and his associates, signified by the "execution of the agreement with the condi- "tions annexed thereto, and the duties and ob- "ligations resulting therefrom, invested the lat- "ter with the right of property in the franchise *"which the Common Council could not take "away or impair by any subsequent act of its "own."*

Even when there is a condition which the holder of the franchise has broken, forfeiture must be enforced in the Courts, as is held in *Dusenbury* vs.

N. Y. W. & C. Traction Co., quoted under Point XI *supra*.

This is the law in other jurisdictions.

In *Newport, etc., R. Co.* vs. *Hampton, etc., R. Co.*, 102 Va., 795, it was held (page 807):

"If from any cause appellee has forfeited its "right to lay its tracks and operate its cars on and "over Mellen Street, such forfeiture cannot be tak-"en advantage of in a private action, and can only "be enforced on behalf of the public at the election "of the State" (Citing cases in this and other States).

In *Fletcher* vs. *Peck*, 6 Cranch, 87, the legislature of Georgia attempted to annul a grant of State lands made by a previous legislature.

The Court held that the grant under the first enactment constituted, when accepted, a contract within the protection of the Federal Constitution and that the second enactment, being an impairment of the contract, was void.

In *Buffet* vs. *Grt. Western R. R. Co.*, 25 Ill., 310, 314, we read:

> "It is not doubted that the legislature is pro-"hibited, by the constitution, from exercising "the power of judicially determining and de-"claring that a contract is forfeited between "individuals. And no reason can be perceived "why it should be exercised when the State it-"self is a party to the agreement. The power, "in either case, is by the constitution devolved "upon the courts, and is consequently prohibit-"ed to the legislative department. It then fol-"lows that this act, so far as it may have been "designed to declare a forfeiture of the charter

"of the Great Western R. R. Co. and to dissolve "that party, is prohibited by the court and is "inoperative and void."

And it is further ordered that upon the amendment of the remittitur as aforesaid it be returned to the Supreme Court in and for the County of New York.

(A copy).

JNO. H. REYNOLDS,
Deputy Clerk.

Seal. Court of Appeals,
State of New York.

EXHIBIT B.

Amendment Inserted in the Remittitur.

And afterwards, to wit, on April 22nd, 1914, a motion having been made, on the return of an order to show cause, by the attorney for the appellant, for an amendment of the remittitur herein, which motion was "granted to the extent of amending the "remittitur so as to recite therein the submission "of the 12th point in the appellant's brief, setting "forth said point in full;" remittitur is hereby amended in accordance with the order of this Court dated April 28th, 1914, attached hereto and made a part hereof.

[The order printed as Exhibit A (*supra*) was attached to the remittitur].

Office Supreme Court, U. S.
FILED
OCT 13 1914
JAMES D. MAHER
CLERK

Affidavit in Opposition to Motion for Writ of Certiorari for Diminution of the Record.

Supreme Court of the United States.

THE NEW YORK ELECTRIC LINES COMPANY,
Plaintiff-in-Error,

against

EMPIRE CITY SUBWAY COMPANY,
Respondent-Defendant-In-Error.

October Term, 1913—No. ~~370~~. 63

STATE OF NEW YORK, *County of New York*, } ss.:

I, EDMUND L. MOONEY, Counsel for the Respondent-defendant-in-error, being duly sworn, depose and say:

The Respondent-defendant-in-error hereby opposes the motion of the Plaintiff-in-error for a writ of certiorari for diminution of the record herein so as to include in the transcript thereof filed in this Court only the order made in this cause by the Court of Appeals of the State of New York on the 28th day of April, 1914, and the amendment made to the remittitur herein pursuant to said order, for the following reasons:

By the stipulation entered into between the attorneys for the respective parties herein dated May 1, 1914, and which is incorporated and set forth at length in the affidavit of Wayne W. Wilson, upon which this motion is based, it was provided that not only the aforesaid order and the amendment made to the remittitur herein pursuant to said order should be filed as part of the record before this Court, but that, in addition thereto, there should also be filed with this Court the said stipulation, together with the papers thereto annexed, namely, the order to show cause, dated April 18, 1914, why said order should not be made, the affidavit of Wayne W. Wilson, sworn to April 18, 1914, the affidavit of Alton B. Parker, sworn to April 17, 1914, the affidavit of J. Aspinwall Hodge, sworn to April 18, 1914, in support of the motion on the return of said order to show cause, and the affidavit of Charles T. Russell, sworn to April 22, 1914, and the affidavit of Edmund L. Mooney, sworn to April 22, 1914, in opposition thereto. It was also provided by said stipulation that those papers should be "handed "to the Court on or before the argument herein, "with the same effect and no other as if a writ "of certiorari had been issued out of this Court "to the Supreme Court of New York, directing a "return to this Court of the above mentioned pa-"pers, and as if the above mentioned papers had "been so returned." It was also provided by said stipulation that the relator would "forthwith cause this stipulation, together with the exhibits hereto annexed, to be printed and presented to this Court on or before the argument herein." That stipulation has not been revoked, withdrawn or cancelled, and is still in full force and effect. In pursuance of that stipulation, and on or about

the 1st day of May, 1914, the said stipulation, together with the aforesaid papers thereto annexed, were printed by the Relator entitled "Stipulation and Supplemental Record" and three copies thereof, one of which is submitted herewith, were served upon me as the Counsel for the Respondent. Consequently, and as said stipulation was made, as is recited therein, "with the same effect and no other as if a writ of certiorari had been issued out of this Court to the Supreme Court of New York, directing a return to this Court of the above mentioned papers and as if the above mentioned papers had been so returned," there is no necessity now for a writ of certiorari herein for a diminution of the record, unless it be that the relator desires to avoid the effect of said stipulation and to have, by the writ now sought, the transcript of the record in this Court contain only the said order of the Court of Appeals dated April 28, 1914, and the amendment made to the remittitur pursuant to said order, as is asked for in the motion, without the papers upon which said order was made and the aforesaid stipulation concerning the same.

Furthermore, by said stipulation there was preserved to the Respondent the right to object upon the argument of the appeal herein before this Court, as follows:

> "That the Court of Appeals of the State of New York had no power or authority to direct the return of said remittitur, or to amend the same or return the same to the Supreme Court of the State of New York, that this Court upon the return should not under the practices in such cases prevailing consider the said papers, or any of them, as properly part of the record."

The effect of granting this motion for a writ of certiorari for dimunition of the record might be: to nullify the aforesaid stipulation which was made in lieu of the writ now sought; to present to this Court the order of the Court of Appeals dated April 28th, 1914, without the papers upon which it was made; to prevent this Court from examining the papers upon which said order amending the remittitur was made; to deprive the respondent of the benefit of having before this Court the papers mentioned in said stipulation; and to prevent the respondent from urging upon this Court the aforesaid objection to the power of the Court of Appeals to make the said order. Without said papers the facts and circumstances involved in plaintiff-in-error's application to the Court of Appeals for amendment of the remittitur would not appear before this Court, nor would the grounds of respondent's opposition to such application be shown, all of which I verily believe will be necessary in order for this Court to determine whether or not the above quoted objection is well founded.

Plaintiff-in-error did not apply for a writ of error until October, 1912. The printed record in this Court was prepared and served on December 12, 1912. Not until April 22, 1914, and after the brief of defendant-in-error had been served on counsel for the plaintiff-in-error, was any Federal question attempted to be raised. On that day the plaintiff-in-error applied to the Court of Appeals upon the return of an order to show cause, dated April 18, 1914, for a certificate certifying

> "that Federal questions were raised by the Relator-Appellant before the Court of Appeals, to wit:

That the franchise possessed by the relator was irrevocable by the state or any of its agents and that the resolution of the Board of Estimate and Apportionment of the City of New York passed on the 11th day of May, 1906, and purporting to revoke the said franchise, was unconstitutional and invalid in that it violated the provision contained in Article I, Section 10 of the Constitution of the United States, providing against the impairment of the obligation of contracts, and in that it violated the provision contained in Section I of the XIV Amendment of the Constitution of the United States providing that no State shall deprive any person of life, liberty or property without due process of law,—and that said federal questions were decided by this Court against the appellant and in favor of the revocability of said franchise and of the validity of said resolution or ordinance revoking the same; why the remittitur in the above entitled action should not be amended by adding thereto said certificate; why a duplicate original of said certificate or a certified copy thereof under the seal of this Court should not be delivered to the relator's attorney for presentation to the Supreme Court of the United States, should he be so advised; and why the appellant should not have such other further, like or different relief, to the end that it may further and more clearly appear herein that said federal questions were duly raised and decided by this court against the contentions made by the relator that its franchise was irrevocable, because protected by the aforesaid constitutional guarantees and in favor of the contention of the respondent that the said revoking resolution of May 11th, 1906, was valid."

The motion was opposed by the defendant-in-error, and in view of that opposition the Court of Appeals did not make a certificate that a federal question was involved nor amend its remitti-

tur to show that such a federal question had been presented, but made an order, dated April 28, 1914, directing merely that the remittitur of that Court be amended by adding thereto and incorporating therein the statement that there was submitted to that Court a brief by Counsel for the appellant therein and plaintiff-in-error herein containing a point designated as "XII", which is set forth at length in said order.

That is the order which the plaintiff-in-error seeks by this motion to have made part of the transcript of the record herein, filed in this Court, but without the papers upon which it is based.

If the motion were to be granted, the result would be that there would be no record or papers before this Court showing that the Court of Appeals had in effect refused to certify that a Federal question was argued or involved in that Court and that it had refused, in effect, to give a certificate that such a Federal question was involved.

If this Court decides to grant the motion, we ask that there be incorporated in the decision thereon a provision that the papers upon which the order amending the remittitur was granted be made part of the record with the said order. Otherwise the above mentioned stipulation between the parties will be vitiated to the prejudice of the respondent-defendant-in-error, and this Court will have before it only a partial record of the proceedings to amend the remittitur in the Court of Appeals of the State of New York.

EDMUND L. MOONEY.

Sworn to before me, this
8th day of October, 1914.

CHARLES F. QUANTRELL,
Notary Public,
Kings Co., Cert. filed in N. Y. Co.

Seal

Office Supreme Court, U. S.
FILED
OCT 13 1914
JAMES D. MAHER
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1913.

No. 870 63.

THE NEW YORK ELECTRIC LINES COMPANY,
Relator-Plaintiff-in-Error,

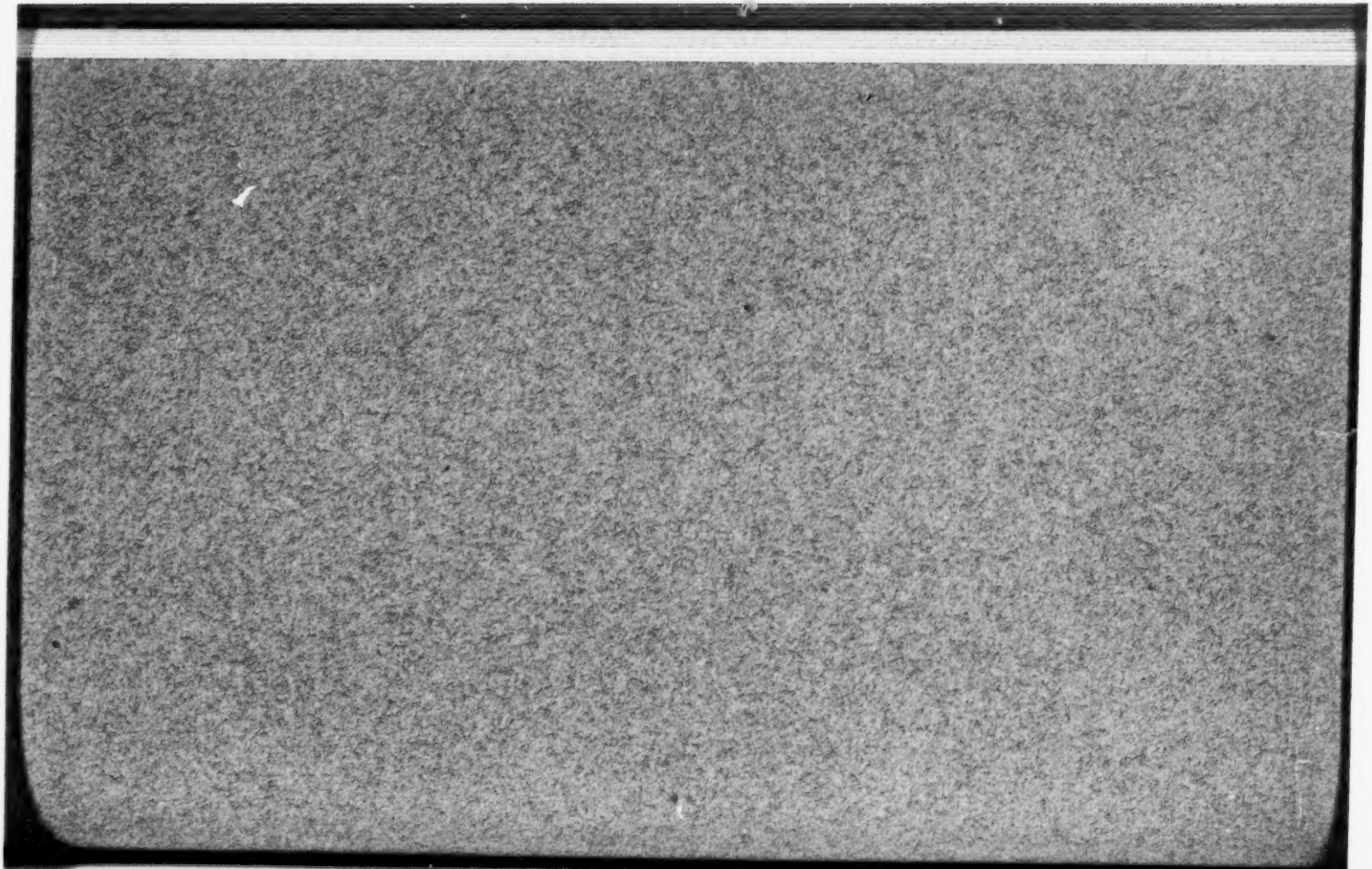
vs.

EMPIRE CITY SUBWAY COMPANY, (Limited),
Respondent-Defendant-in-Error.

BRIEF OF RESPONDENT-DEFENDANT-IN-ERROR IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI FOR DIMINUTION OF THE RECORD.

EDMUND L. MOONEY,
Attorney for Defendant-in-Error,
37 Wall Street,
New York City.

EDMUND L. MOONEY,
CHARLES T. RUSSELL,
Of Counsel.



Supreme Court of the United States.

THE NEW YORK ELECTRIC LINES COMPANY,
Plaintiff-in-error,

against

EMPIRE CITY SUBWAY COMPANY (Limited),
Defendant-in-error.

October Term, 1913—No. 370.

Brief of respondent-defendant-in-error in Opposition to motion for Writ of Certiorari for Diminution of the Record.

The Respondent-Defendant-in-error opposes the motion for a writ of certiorari for diminution of the record herein, to be directed to the Supreme Court of the State of New York, so as to include therein the order made by the Court of Appeals of the State of New York, on the 28th day of April, 1914, and the amendment made to the remittitur by reason of said order, not now contained in the transcript of record herein, filed in this Court, upon the following grounds:

By the stipulation dated May 1st, 1914, set forth at length in the moving affidavit, it was agreed

that not only the afore-mentioned order, and the amendment to the remittitur herein pursuant to said order, but, in addition thereto, all of the papers recited in the order and upon which it is based, together with the stipulation, should be printed and presented to this Court on or before the argument herein, and should be filed as part of the record before this Court "with the same effect and no other, as if a writ of certiorari had been issued out of this Court to the Supreme Court of the State of New York, directing the return to this Court of the above mentioned papers, and as if the above mentioned papers had been so returned."

These papers have been printed by the plaintiff-in-error, and are contained in a separate cover entitled: "Stipulation and Supplemental Record." Three copies thereof have been served upon the Counsel for the defendant-in-error; and supplemental briefs upon the questions raised thereby have been served by both parties. Consequently, there is no necessity for this motion, unless it be that the plaintiff-in-error is seeking to avoid the stipulation, and thereby avoid presenting to this Court all the papers mentioned therein. That stipulation has been acted upon by both parties, and is still in full force and effect. Without these papers the defendant-in-error might not be entitled to raise the following objection to the Order of the Court of Appeals, and preserved to it by the stipulation:

> "That the Court of Appeals of the State of New York had no power or authority to direct the return of said remittitur or to amend the same, or return the same to the Supreme Court of the State of New York; that this Court upon the return should not, under the practice in such cases prevailing,

consider the said papers or any of them, as properly part of the record herein."

The defendant-in-error desires to present that objection to this Court upon the argument herein, for the following reasons:

(a) *The Court of Appeals of the State of New York had no power to amend the remittitur after the lapse of three years from the time this Court had issued its writ of error, and the order purporting to amend should not be made a part of the formal record in this Court.*

In this case, the certification of Point 12 of the relator's brief was made by the Court of Appeals three years after the writ of error had been granted by this Court and long after the record and proceedings had been transferred to this Court. When the certification was made, therefore, the Court of Appeals of the State of New York did not have the case before it and had lost control of the record, so that said certification could not become a part of the record. In *Home for Incurables* vs. *The City of New York*, 187 U. S. 155, it was held that a certificate of the Chief Judge of the Court of Appeals of the State of New York to the effect that Federal questions were raised and decided, made at a time when the case was not before it or under its control, was not a part of the record and could not give this Court jurisdiction to determine a Federal question not appearing otherwise from the record to have been brought to the attention of the State Court (Page 158). The certification of the brief was also improper because it was made after the rendition of final judgment without a rehearing upon the merits: *Miller* vs. *Cornwall Railroad*

Company, 168 U. S. 131-134; *Weber* vs. *Rogan*, 188 U. S. 10-14.

(b) *The so-called amended remittitur, containing Point 12 of the Relator's brief in the Court of Appeals should not be considered in determining whether any Federal question was raised or decided in the Court of Appeals of the State of New York.*

The certification of Point 12 of the Relator's brief in the Court of Appeals, although in the form of an order purporting to amend the remittitur, merely certifies that Point 12, and the matter contained therein, was submitted to the Court on the argument of the appeal. It certainly can have no other or greater effect than to present to this Court part of the argument of counsel, verified as correct by the certificate or order.

It has several times been held by this Court that arguments of counsel form no part of the record. *Gibson* vs. *Chouteau*, 75 U. S. (8 Wall.) 314-318; *Sayward* vs. *Denny*, 158 U. S., 180-184.

In *N. Y. C. & H. R. R. R. Co.* vs. *City of New York*, 186 U. S. 269, the appellant, in an attempt to show the raising of a Federal question, relied upon a copy of its brief, certified by the Chief Judge of the Court of Appeals of the State of New York, as containing certain matters. In the opinion of this Court last cited the case of *Zadig* vs. *Baldwin*, 166 U. S. 485, is cited and quoted from as showing that the brief did not become a part of the record and could not raise a Federal question when the record did not disclose that it was otherwise raised. Hence, the brief is not to be considered as a part of the record in this Court

in determining whether a Federal question was raised and decided in the State Court.

Whatever may be considered to be the effect of the briefs submitted to the State Court, it seems to be settled in this Court that they cannot, in themselves, be considered as sufficient to raise a Federal question, not otherwise properly appearing to have been raised by the record.

As we have noted, they do not become a part of the record proper. In *Glenn* vs. *Garth*, 147 U. S. 360, it was said in the opinion of this Court (Page 370): "Nor can the contention of counsel, that the Virginia Statutes should be construed according to their views, be treated as the equivalent of the express assertion of a right arising under the Constitution or laws of the United States."

The reason for the insistance of this Court that the Federal question shall be raised in the Court below and the fact that it was raised clearly appear from the record, is stated in the opinion of Mr. Justice Taney in *Grand Gulf R. R. & Banking Co., etc.* vs. *Marshall*, 53 U. S. (12 Howard) 165, to be that if the appellant omits to raise the point properly on the record, there is no reason to permit him to harass the adverse party by a writ of error to this Court, when, for aught that appears in the record, the judgment of the State Court might have been in his favor if its attention had been directed to the question. Hence, the rule is just that the omission to raise the question properly in the record cannot be cured by the briefs or arguments of counsel, and certainly it should not be held to be cured by the certification of a portion of the brief of the relator in the Court below made three years after the granting of the

writ of error by an order amending the remittitur.

The plaintiff-in-error applied to the State Court for a formal certificate stating that a Federal question had been raised and determined, but succeeded only in obtaining a certification of Point XII of its Brief in the State Court.

The plaintiff-in-error fearing that the Federal question was not raised by the record, tried to cure this defect by obtaining a formal certificate, and failing to obtain it now seeks to give an unwarranted effect to a mere certification of a part of its *brief* in the State Court by the amended remittitur.

We contend now, as heretofore, that no Federal question was raised by the record, that the opinion of the Courts below did not pass upon any such question nor did the brief raise it.

(c) *If the motion were to be granted, the result would be that there would be no record or papers before this Court showing that the Court of Appeals had in effect refused to certify that a Federal question was argued or involved in that Court, and that it had refused, in effect, to give a certificate that such a Federal question was involved.*

If this Court decides to grant the motion, we ask that there be incorporated in the decision thereon a provision that the papers upon which the order amending the remittitur was granted be made part of the record with the said order. If such a provision be not inserted in the order, the above mentioned stipulation between the parties will be vitiated to the prejudice of the re-

spondent-defendant-in-error, and this Court will have before it only a partial record of the proceedings to amend the remittitur in the Court of Appeals of the State of New York.

Respectfully submitted,

EDMUND L. MOONEY,
Attorney for defendant-in-error,
37 Wall Street,
New York City.

EDMUND L. MOONEY,
CHARLES T. RUSSELL,
Of Counsel.

NEW YORK ELECTRIC LINES COMPANY *v.* EMPIRE CITY SUBWAY COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

No. 63. Argued November 5, 6, 1914.—Decided November 30, 1914.

If it sufficiently appears that plaintiff in error raised the question of constitutionality of later legislation repealing that on which its contract rested, as impairing the obligation of that contract, and that the state court gave effect to the repealing legislation, the case is properly here under § 237, Judicial Code.

Under such conditions, it is the duty of this court to determine for itself whether a contract existed and whether its obligation has been impaired.

A street franchise which becomes operative upon the grant of the consent of the city is a property right. The grant is not a nude pact, but rests upon an obligation, expressly or impliedly assumed, to carry on the undertaking to which the grant relates. Such grants are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance.

Grants of franchises are subject to the tacit condition that they may be lost by non-user or mis-user. The condition thus implied is a condition subsequent.

A franchise is given in order that it may be exercised for the public good, and failure to exercise as contemplated is ground for revocation and withdrawal.

An indefeasible interest only becomes vested under a franchise which has not only been duly granted, but has also been exercised in conformity with the grant.

Whether the authorities shall proceed in case of forfeiture of franchise for non-user or mis-user by *quo warranto* or, as in this case, by ordinance of repeal, the propriety of which can be adjudicated in a subsequent legal proceeding, is entirely a matter of state law.

In this case, *held* that as the right to use the streets was to be used within a reasonable time or lost, and as it never had been used, an ordinance of the City of New York of May 11, 1906, revoking the right of the plaintiff in error to lay wires in, and otherwise to use, the

streets of New York under a permission granted in 1878 did not contravene the impairment of obligation clause of the Federal Constitution.

Judgment based on 201 N. Y. 329, affirmed.

THE facts, which involve rights and obligations of a corporation licensed by municipal ordinance to maintain electric wires, and the validity under the impairment of obligation clause of the Federal Constitution of a subsequent revocation of the license by the municipality owing to mis-user and non-user, are stated in the opinion.

Mr. Alton B. Parker and *Mr. J. Aspinwall Hodge*, with whom *Mr. Henry A. Gildersleeve* was on the brief, for plaintiff in error:

Relator's permit of 1883 was an irrevocable contract.

Performance was unnecessary for the creation of this property right; there was, however, performance which would have been complete but for the acts of the State and city. Acts of 1848, ch. 265; 1853, ch. 471; 1873, ch. 335; 1881, ch. 483; 1884, ch. 534; 1885, ch. 499; 1887, ch. 716; 1891, ch. 231; *Africa* v. *Mayor*, 70 Fed. Rep. 729; *Mayor* v. *Telephone Co.*, 115 Fed. Rep. 304; *Capital City Co.* v. *Tallahassee*, 186 U. S. 401; *Louisville* v. *Cumberland Tel. & Tel. Co.*, 224 U. S. 649; *New York* v. *Bryan*, 196 N. Y. 158; *Rochester* v. *Rochester Ry. Co.*, 182 N. Y. 99; *Detroit* v. *Detroit &c. Ry. Co.*, 64 Fed. Rep. 628; *S. C.*, 184 U. S. 368; *Ghee* v. *Northern Gas Co.*, 158 N. Y. 510; *Re Brooklyn El. R. R.*, 125 N. Y. 434; *Mayor* v. *Africa*, 77 Fed. Rep. 501; *Milhan* v. *Shape*, 27 N. Y. 611; *Owensboro* v. *Cumberland Tel. Co.*, 230 U. S. 58; *Pearsall* v. *Great Northern Ry.*, 73 Fed. Rep. 933; *S. C.*, 161 U. S. 646; *People* v. *O'Brien*, 111 N. Y. 1; *People* v. *Sturtevant*, 9 N. Y. 273; *N. Y. Edison Co.* v. *Willcox*, 207 N. Y. 86; *Woodhaven Gas Co.* v. *Deehan*, 153 N. Y. 528; *S. R. T. Co.* v. *New York*, 128 N. Y. 510; *Trustees* v. *Jessup*, 162 N. Y. 122; *Wright* v. *Nagle*, 101 U. S. 791.

This appeal necessarily involves a Federal question.

That the Federal question was raised and decided appears from the record and the opinion of the state court.

The Federal question was necessarily decided by the state court.

The relator accepted and acted upon its franchise.

The relator's franchise includes the right to lay wires in the streets for telephonic purposes, and to either use them or to lease them to others for such purposes.

By reversing its own construction of the relator's contract, the State of New York has impaired the obligation of the contract of the relator with the city and with the State.

The relator completed its formal acceptance of its franchise from the city by duly filing the map which the ordinance called for.

The relator has wholly complied with ch. 263 of the Laws of 1892 and no issue of non-compliance has ever been raised, nor can it be.

The relator is the real party in interest.

The application for the writ of mandamus was made in good faith.

The relator has lost no rights by alleged laches and no statute of limitations is involved herein.

The relator has never assigned its franchise.

The city is estopped to question the relator's franchise by the acceptance of taxes.

In support of these contentions see cases *supra* and *Adams Co.* v. *B. & M. R. Co.*, 39 Iowa, 507; *American Emigrant Co.* v. *Iowa Land Co.*, 52 Iowa, 323; *Atty. Gen'l* v. *P. & R. R.*, 6 Iredell, 456; *Audubon Co.* v. *American Emigrant Co.*, 40 Iowa, 460; *Brandriff* v. *Harrison*, 50 Iowa, 164; *Central &c. Co.* v. *Averrill*, 199 N. Y. 128; *Chambers* v. *Baltimore and Ohio R. Co.*, 207 U. S. 142; *Commercial Power Co.* v. *Tacoma*, 17 Washington, 670; *Curran* v. *Arkansas*, 15 How. 302; *Dorr* v. *Esders*, 112

App. Div. 897; *Douglas* v. *Kentucky*, 168 U. S. 488, 502; *Eichner* v. *Met. St. R. R.*, 114 App. Div. 247; *Franchise Tax Cases*, 174 N. Y. 417; *Furman* v. *Nichol*, 8 Wall. 44, 56; *Gelpcke* v. *Dubuque*, 1 Wall. 175; *Gumbes* v. *Hicks*, 116 App. Div. 120; *Hess* v. *N. Y. Underground Telegraph Co.*, N. Y. Register, Jan. 25, 1887; *James* v. *Signell*, 60 App. Div. 75; *Jersey City Ry. Co.* v. *Passaic*, 68 N. J. L. 110; *In re Long Acre Co.*, 51 Misc. 407; *S. C.*, 188 N. Y. 361; *Los Angeles* v. *Water Works Co.*, 177 U. S. 570, 576; *Louisiana* v. *Pillsbury*, 105 U. S. 278, 294; *McCullagh* v. *Reby*, 9 N. Y. Supp. 361; *Muhlker* v. *N. Y. & H. R. R.*, 197 U. S. 544, 570; *Murdock* v. *City of Memphis*, 20 Wall. 590; *Northern Pacific Ry.* v. *Boyd*, 228 U. S. 482; *Peck* v. *Burr*, 10 N. Y. 294; *Lodes* v. *Health Dept.*, 189 N. Y. 187; *N. Y. Electric Lines* v. *Ellison*, 115 App. Div. 254; *S. C.*, 188 N. Y. 531; *N. Y. Electric Lines* v. *Squire*, 14 Daly, 184; *S. C.*, 107 N. Y. 593; *S. C.*, 145 U. S. 175; *People* v. *W. & D. R. R.*, 128 N. Y. 240; *Philadelphia Fire Ass'n* v. *New York*, 119 U. S. 110, 116; *Pollitz* v. *Wabash R. R.*, 207 N. Y. 113; *Roby* v. *Colehour*, 146 U. S. 153; *Water Co.* v. *Rochester*, 176 N. Y. 36; *St. Louis* v. *West. Un. Tel. Co.*, 148 U. S. 92; *Sauer* v. *New York*, 206 N. Y. 536; *Simplot* v. *Dubuque*, 49 Iowa, 630; *Sullivan* v. *Texas*, 207 U. S. 416, 423; *Traction Co.* v. *North Arlington*, 67 N. J. L. 162; *Walter A. Wood Co.* v. *Skinner*, 139 U. S. 293; Laws of 1892, ch. 263; Laws of 1899, ch. 712; Transportation Law, § 140.

Mr. Edmund L. Mooney, with whom *Mr. Charles T. Russell* and *Mr. Frederick A. Card* were on the brief, for defendant in error:

The appeal should be dismissed as not involving a Federal question.

No Federal question was raised or decided.

If any Federal question was raised, its decision was not necessary to judgment.

Non-user and abandonment is a non-Federal question.

There is no existing demand, occupation is not assured, public interests do not require construction; all these are non-Federal questions.

This proceeding is solely to enable relator to promote a telephone business, which was beyond the scope of the permission granted.

Relator was incorporated to conduct a subway conduit business, not a telephone business.

Declarations and disclaimers in previous litigations and acts of the parties furnish practical construction of the franchise.

The permission granted to relator by resolution of Common Council of April 10, 1883, was not accepted and acted upon in fact, and is no longer in force.

The attempted transfer of the franchise to the Great Eastern Co. was a breach of condition contained in the resolution of permission.

The permission or the secondary franchise was lost by non-user and abandonment.

Assuming that a formal acceptance would have been sufficient, the acceptance in writing of the permission was not a complete formal acceptance, in the absence of the filing of a *bona fide* map, specifying amount and position of spaces.

The decision of the Federal question, if such be properly raised, does not control the whole case. Other points warrant affirmance.

A party applying for a peremptory writ of mandamus admits the truth of the allegations in the opposing affidavits.

The relator is not the real party in interest.

The application is not made in good faith.

The relator lost whatever right it had by laches.

In support of these contentions, see cases cited by plaintiff in error which can be distinguished and *In re Bingham-*

ton Bridge, 3 Wall. 51; *Boise Artesian Co.* v. *Boise City*, 230 U. S. 84; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116; *Castillo* v. *McConnico*, 168 U. S. 674; *Chicago City Ry. Co.* v. *Storey*, 73 Illinois, 541; *New York* v. *N. Y. Refrigerating Co.*, 146 N. Y. 210; *City Ry. Co.* v. *Citizens St. Ry. Co.*, 166 U. S. 557; *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550; *De Saussure* v. *Gaillard*, 127 U. S. 216; *Delaware, L. & W. R. R. Co.* v. *Oswego*, 92 N. Y. App. Div. 551; *Dewey* v. *Des Moines*, 173 U. S. 193; *Endowment Assn.* v. *Kansas*, 120 U. S. 103; *Eustis* v. *Bolles*, 150 U. S. 361; *City Ry. Co.* v. *Galveston City St. Ry.*, 63 Texas, 529; *Harshman* v. *Bates County*, 92 U. S. 569; *Hulbert* v. *Chicago*, 202 U. S. 275; *Insurance Co.* v. *Dutcher*, 95 U. S. 269; *Johnson* v. *N. Y. &c. Co.*, 187 U. S. 491; *Layton* v. *Missouri*, 187 U. S. 356; *Leathe* v. *Thomas*, 207 U. S. 93; *Louisville Trust Co.* v. *City of Cincinnati*, 76 Fed. Rep. 296; *Matter of Taylor*, 117 N. Y. App. Div. 248; *Moore* v. *Mississippi*, 21 Wall. 636; *New York Cent. R. R.* v. *New York*, 186 U. S. 269; *New Orleans Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650; *Nicoll* v. *Sands*, 131 N. Y. 19; *Otis* v. *Oregon S. S. Co.*, 116 U. S. 548; *People* v. *Adirondack Ry.*, 160 N. Y. 225; *People* v. *Collis*, 6 N. Y. App. Div. 467; *People* v. *French*, 31 Hun (N. Y.), 617; *People* v. *Rome, Watertown &c. Co.*, 103 N. Y. 95; *Althause* v. *Giroux &c. Co.*, 122 App. Div. 617; *Connolly* v. *Board of Education*, 114 App. Div. 1, aff'd 187 N. Y. 535; *Durant* v. *Jeroloman*, 139 N. Y. 14; *Hunter* v. *National Park Bank*, 122 App. Div. 635; *Lehmaier* v. *Interurban St. Ry. Co.*, 85 App. Div. 407; *McMackin* v. *Board of Police*, 46 Hun, 296; *Millard* v. *Chapin*, 104 N. Y. 96; *Nelson* v. *Marsh*, 82 App. Div. 571, aff'd 178 N. Y. 618; *Phelps* v. *Delaware Common Pleas*, 2 Wend. 257; *Pumpyansky* v. *Keating*, 168 N. Y. 390; *Sherwood* v. *Board of Canvassers*, 129 N. Y. 360; *Postal Tel. Co.* v. *Baltimore*, 156 U. S. 210; *Seeberger* v. *McCormack*, 175 U. S. 274; *Seymour* v. *Warren*, 179 N. Y. 1; *State* v. *Board of Liquidation*, 98 U. S. 140; *Telluride*

Power Co. v. *Rio Grande R. R. Co.*, 187 U. S. 569; *The Victory*, 6 Wall. 382; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Winona &c. R. Co.* v. *Plainview*, 143 U. S. 371; *Woolsey* v. *Funke*, 121 N. Y. 87; *Yazoo & M. R. Co.* v. *Adams*, 180 U. S. 41; *Zadig* v. *Baldwin*, 166 U. S. 485.

By leave of court *Mr. Alfred B. Cruikshank* filed a brief as *amicus curiæ*, on behalf of Clifford L. Middleton.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a writ of error to review the denial by the state court of an application for a writ of peremptory mandamus directing the Empire City Subway Company (Limited) to lease space in its conduits in the City of New York to the plaintiff in error.

In the year 1884, the legislature of the State of New York required that 'all telegraph, telephonic and electric light wires' in certain cities—New York and Brooklyn—should be placed under the surface of the streets (Laws of 1884, chap. 534). Under the authority of a statute passed in the next year (Laws of 1885, chap. 499, amended by Laws of 1886, chap. 503), the Board of Commissioners of Electric Subways adopted a plan by which the City of New York should enter into a contract with a company to construct the necessary subways, etc., which other companies operating electrical wires should be compelled to use, paying therefor a reasonable rent. Under contracts, made accordingly and ratified by the legislature (Laws of 1887, chap. 716), subways, etc., were constructed by the Consolidated Telegraph & Electrical Subway Company. The board first-mentioned was succeeded by the Board of Electrical Control (Laws of 1887, chap. 716); and, in 1890, the subways, conduits and ducts for low tension conductors, which had been thus provided, were transferred to the Empire City Subway Company (Limited), the de-

fendant in error. The latter company, by contract with the Board and the City, made in 1891 under legislative authority (Laws of 1891, chap. 231), agreed to build, maintain and operate subways, etc., as specified—it being provided that spaces therein, upon application, should be leased "'to any company or corporation having lawful power to operate telegraph or telephone conductors in any street' in the City of New York.

The plaintiff in error, The New York Electric Lines Company, claiming to be entitled to space in these subways, made application therefor on or about June 10, 1910. The request was refused and the present proceeding for a peremptory mandamus was brought. The assertion of right rested upon a permission granted by the City of New York, through its Common Council, to the plaintiff in error, on April 10, 1883, to lay electrical conductors in the City's streets. This permission, the City by its Board of Estimate and Apportionment, which had succeeded to the powers of the former Common Council in the matter, had formally revoked by a resolution adopted on May 11, 1906, reciting that whatever rights the company had secured under the permission in question had long since been forfeited by non-user. The Court of Appeals of the State, holding that the Board of Estimate and Apportionment had this power of revocation, and had duly exercised it, affirmed an order refusing the writ of mandamus. *Matter of New York Electric Lines Co.*, 201 N. Y. 321. The plaintiff in error insists that the resolution thus sustained was an unconstitutional impairment of the obligation of its contract with the City.

We think that it sufficiently appears that this question was raised in the state court, and as the state court gave effect to the repealing resolution the case is properly here. It is therefore the duty of this court to determine for itself whether a contract existed and whether its obligation has been impaired. *Douglas* v. *Kentucky*, 168 U. S. 488, 502;

St. Paul Gas Light Co. v. *St. Paul*, 181 U. S. 142, 148; *Grand Trunk Western Ry. Co.* v. *South Bend*, 227 U. S. 544, 551; *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, 556; *Louisiana Railway & Navigation Co.* v. *New Orleans*, decided this day, *ante*, p. 164.

The plaintiff in error was incorporated in the year 1882, under a general law of the State of New York (Laws of 1848, chap. 265, as amended by Laws of 1853, chap. 471). Its certificate of incorporation stated, among other things, that it was incorporated for the purpose of 'owning, constructing, using, maintaining and leasing lines of telegraph wires or other electric conductors for telegraphic and telephonic communication and for electric illumination, to be placed under the pavements of the streets . . . of the Cities of New York and Brooklyn' and 'for the purpose of owning franchises for laying and operating the said lines of electric conductors.' Chapter 483 of the Laws of 1881 had authorized any company so incorporated 'to construct and lay lines of electrical conductors underground in any city,' provided that it 'first obtain from the common council' of such city the 'permission to use the streets' for the purposes set forth. The permission in question, which as already stated, was granted by the Common Council of the City of New York, on April 10, 1883, was (omitting parts not here material) as follows:

"*Resolved*, that permission be and hereby is granted to the New York Electric Lines Company, to lay wires or other conductors of electricity in and through the streets, avenues and highways of New York City and to make connections of such wires or conductors underground by means of the necessary vaults, test boxes and distributing conduits, and thence above ground with points of electric illuminations or of telegraphic or telephonic signals in accordance with the provisions of an ordinance . . . approved . . . December 14, 1878."

It was also resolved that the Company should not

'transfer or dispose of the franchise hereby granted without the further authority of the Common Council.'

On April 24, 1883, the plaintiff in error presented to the Common Council, and the latter spread upon its minutes, a formal acceptance of the permission, which after the recitals states:

"Now, therefore, the said New York Electric Lines Company by these presents accepts the said franchise as contained in the ordinance and resolutions adopted by the Honorable the Board of Aldermen, April 10, 1883, and agrees to, assumes and obligates itself in the observance of all the requirements, provisions, restrictions, conditions and limitations contained in the said last mentioned ordinance as adopted April 10, 1883, as well also as to the provisions, conditions and obligations of the said general ordinance approved by the Mayor December 14, 1878."

The ordinance of 1878, referred to, regulated the method of laying wires under the streets, and provided that within six months after the grant of permission, grantees should file with the County Clerk 'maps, diagrams and tabular statements indicating the amount and position of the spaces proposed to be occupied by them.' In May, 1883, the plaintiff in error, in asserted compliance with the ordinance, filed a map, diagrams and statement. It is alleged in the affidavits presented on the application for mandamus that the plaintiff in error secured inventions and patent rights, that it had an office and factory, that it prosecuted experimental work in relation to its project, and expended in this way large sums of money. But, in the actual construction of conduits or laying of wires, nothing was done prior to the legislation of 1885 and 1886, which as we have seen provided for a comprehensive plan for the building of subways in which electrical conductors should be placed.

Section 3 of the act of 1885 expressly made it obligatory upon any company 'operating or intending to operate elec-

trical conductors,' and desiring or being required to place its conductors underground, to file with the board of commissioners a 'map or maps, made to scale,' showing the proposed plan of construction of its underground electrical system and 'to obtain the approval by said board of said plan' before any underground conduits should be constructed. The plaintiff in error did not submit a plan to the board as required by the statute. In July, 1886, it applied to the Commissioner of Public Works for a permit to make the necessary excavations in the streets for the purpose of laying conductors, and, on the application being denied petitioned for a writ of peremptory mandamus to direct the Commissioner to grant it. It was insisted in its petition in that proceeding that it had 'never operated or intended to operate electrical conductors,' its intention having always been 'to lease to other persons, natural or corporate, all of its electrical conductors, and not to operate itself any' of them; that the acts of 1885 and 1886 (above mentioned), relating to the construction of subways, did not apply to the plaintiff in error; and that, if they were applicable, they violated the Federal Constitution being an impairment of its contract with the City and operating to deprive the plaintiff in error of its property without due process of law. The state court held that the statutes in question were applicable to the plaintiff in error, and were constitutional, and refused the mandamus. *People, ex rel. New York Electric Lines Co.* v. *Squire*, 107 N. Y. 593.

This court affirmed the judgment (*id.*, 145 U. S. 175), saying (pp. 187, 188):

"In no sense of the term do we think it can be safely averred that the acts of 1885 and 1886 are not applicable to the relator. . . . Neither can it be said that the acts of 1885 and 1886 have a retroactive effect, at least so far as the relator is concerned, since whatever rights it obtained under the ordinance of 1883, which it accepted

as the basis of the contract it claims to have entered into, were expressly subject to regulation, in their use, by the highest legislative power in the State acting for the benefit of all interests affected by those rights and for the benefit of the public generally, so long as the relator's essential rights were not impaired or invaded. *New Orleans Gas Company* v. *Louisiana Light Company*, 115 U. S. 650; *Stein* v. *Bienville Water Supply Company*, 141 U. S. 67."

And conceding for the purpose of the discussion, but 'without deciding,' that the plaintiff in error had a contract with the City 'for the laying of its wires, and the construction of its underground electrical system,' this court reached the conclusion that its rights had in no way been impaired by the legislation under review.

This decision was rendered in May, 1892. Meanwhile, pursuant to the statutes above mentioned, a plan of construction had been adopted by the board charged with that duty, subways had been built, and the defendant in error had entered into its contract to maintain and operate them for low tension conductors, as specified, including telegraph and telephone conductors. But for fifteen years after the final decision in the case cited no application was made by the plaintiff in error for space in these subways. The first application for such space was made in June, 1907, and was not granted.

Nor, during this long period, was any attempt made by the plaintiff in error either to build conduits or to place wires under the City's streets, save that in December, 1905, it applied to the Commissioner of Water Supply, Gas and Electricity for a permit to open the streets for that purpose and, on its being denied, a proceeding was begun to obtain a peremptory writ of mandamus. This was refused, and the order to that effect was affirmed by the Court of Appeals of the State. *People, ex rel. New York Electric Lines Co.* v. *Ellison*, 188 N. Y. 523. The pertinent legislation and the subway contracts were reviewed and

the requirement that electrical conductors should be placed in conduits constructed in accordance with the adopted plan, instead of the plaintiff in error being permitted to build its own subways for such conductors, was sustained. In arriving at this result, it was again assumed that the plaintiff in error had a continuing right under the City's permission, but this question was expressly reserved (*id.*, p. 527). A writ of error sued out from this court was dismissed on motion of the plaintiff in error. 214 U. S. 529.

It was about the time when the last-mentioned proceeding was instituted that the City's permission was revoked (May 11, 1906); and the state court, in its opinion in the present case, said that the question 'remaining to be determined' was whether 'the relator, under the resolution of the common council of April, 1883, has the right, as a matter of law, to have its wires inserted in the ducts of the Empire City Subway Company, notwithstanding the revocation of such resolution.' Did a 'bare acceptance' of the permission operate to vest an irrevocable franchise? 201 N. Y. pp. 321, 329. This question was answered in the negative in the view that such a permission is 'a license merely, revocable at the pleasure of the city, unless it has been accepted and some substantial part of the work performed,' as contemplated by the permission, 'sufficient to create a right of property and thus form a consideration for the contract.'

The plaintiff in error challenges this view, insisting that by virtue of the City's permission it is the grantee of an irrevocable franchise in the City's streets; that this franchise was derived from the State; that when the consent of the City was given, as provided in the statute, the grant became immediately operative and could not thereafter be revoked or impaired by municipal resolution or ordinance; that the granted right, however named, is property,—and, as such, is inviolable; and that this position is

supported by numerous decisions both of the state court and of this court, which are cited in the margin.[1] Thus in *Ghee* v. *Northern Union Gas Co.*, 158 N. Y. 510, 513, referring to the legal effect of the consent of the municipal authorities under a statute empowering the corporation to lay gas conduits in streets, on such consent, the court said: "It operates to create a franchise by which is vested in the corporation receiving it a perpetual and indefeasible interest in the land constituting the streets of a municipality. It is true that the franchise comes from the State, but the act of the local authorities, who represent the State by its permission and for that purpose, constitutes the act upon which the law operates to create the franchise." And in *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, 659, where a corporation was authorized to erect poles, etc., over the streets with the consent of the General Council of the City, it was held that the charter franchises became 'fully operative' when the City's consent was obtained. "Such a street franchise has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right of way—but, howsoever designated, it is property." 224 U. S., p. 661. Again, in the recent case of *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 65, it was said: "That an

[1] *Milhau* v. *Sharp*, 27 N. Y. 611, 620; *People* v. *O'Brien*, 111 N. Y. 1, 38; *Suburban Rapid Transit Co.* v. *The Mayor*, 128 N. Y. 510, 520; *People ex rel. Woodhaven Gas Co.* v. *Deehan*, 153 N. Y. 528, 532; *Ghee* v. *Northern Union Gas Co.*, 158 N. Y. 510, 513; *City of Rochester* v. *Rochester Railway Co.*, 182 N. Y. 99, 119; *City of New York* v. *Bryan*, 196 N. Y. 158, 164, 165; *New Orleans Gas Light Co.* v. *Louisiana Light &c. Co.*, 115 U. S. 650, 660; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674, 680, 681; *Walla Walla* v. *Walla Walla Co.*, 172 U. S. 1, 9; *Detroit* v. *Detroit &c. Ry. Co.*, 184 U. S. 368, 394; *Louisville* v. *Cumberland Telephone Co.*, 224 U. S. 649, 658, 663; *Grand Trunk Railway Co.* v. *South Bend*, 227 U. S. 544, 552; *Owensboro* v. *Cumberland Telephone Co.*, 230 U. S. 58, 65; *Boise Water Co.* v. *Boise City*, 230 U. S. 84, 90, 91; *Russell* v. *Sebastian*, 233 U. S. 195, 204.

ordinance granting the right to place and maintain upon the streets of the city poles and wires of such a company is the granting of a property right, has been too many times decided by this court to need more than a reference to some of the later cases." See also *Boise Water Co.* v. *Boise City*, 230 U. S. 84, 91. These municipal consents are intended to afford the basis of enterprise with reciprocal advantages, and it would be virtually impossible to fulfil the manifest intent of the legislature and to secure the benefits expected to flow from the privileges conferred, if, in the initial stages of the enterprise when the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness, or when the work is under way, the municipal consent should be subject to revocation at any time by the authorities,—not upon the ground that the contract had not been performed, or that any condition thereof, express or implied, had been broken, but because as yet no contract whatever had been made and there was nothing but a license which might be withdrawn at pleasure. Grants like the one under consideration are not nude pacts, but rest upon obligations expressly or impliedly assumed to carry on the undertaking to which they relate. See *The Binghamton Bridge*, 3 Wall. 51, 74; *Pearsall* v. *Great Northern Railway*, 161 U. S. 646, 663, 667. They are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance. The case of *Capital City Light & Fuel Co.* v. *Tallahassee*, 186 U. S. 401, to which the defendant in error refers, is not opposed. There the complainant, upon the ground of an exclusive privilege, sought to enjoin a municipality from operating its own electric light plant; although ten years had elapsed since the complainant's grant, the complainant had done nothing whatever to establish an electric light business and under the

express terms of the statute the exclusive privilege had not attached (186 U. S. 410).

But, while the grant becomes effective when made and accepted in accordance with the statute and the grantee is thus protected in starting the enterprise, it has always been recognized that, as the franchise is given in order that it may be exercised for the public benefit, the failure to exercise it as contemplated is ground for revocation or withdrawal. In the cases where the right of revocation in the absence of express condition has been denied, it will be found that there has been performance at least to some substantial extent or that the grantee is duly proceeding to perform. And when it is said that there is vested an *indefeasible* interest, easement, or contract right, it is plainly meant to refer to a franchise not only granted but exercised in conformity with the grant. (See cases cited *supra*.) It is a tacit condition annexed to grants of franchises that they may be lost by mis-user or non-user. *Terrett* v. *Taylor*, 9 Cranch, 43, 51; *Chicago Life Insurance Co.* v. *Needles*, 113 U. S. 574, 580; *Given* v. *Wright*, 117 U. S. 648, 656. The condition thus implied is, of course, a condition subsequent. The same principle is applicable when a municipality under legislative authority gives the permission which brings the franchise into being; there is necessarily implied the condition of user. The conception of the permission as giving rise to a right of property in no way involves the notion that the exercise of the franchise may be held in abeyance for an indefinite time, and that the right may thus be treated as a permanent lien upon the public streets, to be enforced for the advantage of the owner at any time, however distant. Although the franchise is property, 'it is subject to defeasance or forfeiture by failure to exercise it (*People* v. *Broadway R. R. Co. of Brooklyn*, 126 N. Y. 29), or by subsequent abandonment after it has been exercised (*People* v. *Albany & Vermont R. R. Co.*, 24 N. Y. 261).' If 'no time is prescribed, the

franchise must be exercised within a reasonable time.' *City of New York* v. *Bryan*, 196 N. Y. 158, 164.

It follows that where the franchise has not been exercised within a reasonable time in accordance with the condition which inheres in the nature of the grant, its revocation upon this ground cannot be regarded as an impairment of contractual obligation. The privileges conferred may be withdrawn by such methods of procedure as are consistent with established legal principles. This rule, frequently recognized in cases where franchises have been abused or misemployed (see *Chicago Life Insurance Co.* v. *Needles, supra; Farmers Loan & Trust Co.* v. *Galesburg*, 133 U. S. 156, 179; *New Orleans Water Works Co.* v. *Louisiana*, 185 U. S. 336, 347; *Columbus* v. *Mercantile Trust &c. Co. of Baltimore*, 218 U. S. 645, 663; Dillon, Munic. Corp., 5th ed., § 1311), must also be applicable where they have been neglected, that is, have not been used in due time. Whether in such cases, where there has been a municipal permission for use of streets, the State shall proceed directly by *quo warranto*, or whether it shall authorize the municipality to pass a resolution or ordinance of repeal or revocation leaving the propriety of its course to be determined in an appropriate legal proceeding in which the default of the grantee may be adjudicated, is a question of state law with which we are not concerned. The resolution in such case serves to define the attitude of the public authorities, and to revoke the permission where sufficient ground exists for such revocation. Whether there has been such a mis-use or non-exercise of the franchise as to warrant its withdrawal is a matter for judicial consideration.

In the present case, the plaintiff in error, insisting upon its continuing right, despite the resolution of revocation, applied for a peremptory writ of mandamus to compel the Subway Company—a quasi-public instrumentality—to furnish the desired space in its conduits. It had been

held by the state court that this was an available remedy where a company had 'lawful power' to operate its conductors in the City's streets and had been denied the space which the Subway Company by its contract with the City had agreed to give. *Matter of Longacre El. L. & P. Co.*, 188 N. Y. 361. The question of 'lawful power' of the plaintiff in error was considered and the application refused. It is true that it was stated that there was a license only which by reason of non-performance had not ripened into a contract right, but it is equally true that the non-performance shown was available to defeat that right, assuming it to have been created at the time of the grant, and to make the resolution of revocation—which the state court has held was adopted under state authority—entirely proper.

For a long period of years after the final determination of the validity of the statutes authorizing a comprehensive scheme of subway construction, and after the contract with the Subway Company had been made, the plaintiff in error made no attempt to secure space and to exercise the franchise now claimed. It treated that right as susceptible of practically indefinite retention unused. In the circumstances disclosed, its excuses are unavailing. The right conferred, assuming it to be a contract right, was to be used within a reasonable time or lost. In view of the state of the case as to non-exercise, it cannot be said that its constitutional right has been infringed.

Judgment affirmed.